Supreme Court, U. S.
FILED
MAY 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 1595

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The National Association of Broadcasters respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 1, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, dated March 1, 1977, has not yet been officially reported. The "Sec-

ond Report and Order" of the Federal Communications Commission in Docket 18110 is reported at 50 F.C.C.2d 1046 (1975). The FCC's "Memorandum Opinion and Order" denying petitions for reconsideration of the "Second Report and Order" is reported at 53 F.C.C.2d 589 (1975).

The full texts of the opinions below are printed in the Appendices to the Petition for a Writ of Certiorari filed by the FCC in these cases on April 22, 1977, *sub nom. FCC* v. *National Citizens Committee for Broadcasting* (No. 76-1471). For convenience, references herein will be to the FCC's Appendices ("FCC App.").

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1977. (FCC App. 159-60). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and 28 U.S.C. § 2350(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment and the pertinent provisions of the Administrative Procedure Act and the Communications Act are set forth in Appendix A to this Petition.

QUESTIONS PRESENTED

1. Whether an FCC rule prohibiting broadcasters from expressing their views through the publication of a daily newspaper in their local communities abridges First Amendment rights and exceeds the FCC's statutory authority.

2. Whether the Court of Appeals erred in finding it "irrational" for the FCC in a rulemaking proceeding to adopt a new licensing policy prospectively without applying the new policy retroactively to require divestiture by existing licensees previously found to serve the public interest.

3. Whether the Court of Appeals erred in requiring the FCC in a rulemaking proceeding to adopt a rule in the guise of a "presumption" that all existing affiliated co-located broadcast stations and newspapers are not in the public interest and must be divested, regardless of evidence of harm.

4. Whether the Court of Appeals erred in requiring the FCC in a rulemaking proceeding to find that a hoped for increase in diversity is more important than all other competing public interest considerations and must be given controlling weight.

STATEMENT OF THE CASE

This case arises out of a Federal Communications Commission (FCC) rulemaking proceeding, FCC Docket 18110, dealing with the publication of newspapers by radio and television broadcasters.

The portion of the rulemaking proceeding at issue here began in 1970 when the FCC issued a "Further Notice of Proposed Rulemaking," 22 F.C.C.2d 339 (1970) (hereinafter referred to as the "Further Notice"). The rules proposed in the "Further Notice" contained both prospective and retroactive provisions. In essence, the prospective provision would have banned the issuance of a license for a radio or television station to any applicant who directly or indirectly

owned, operated or controlled a daily newspaper in the community to be served by the broadcast station. Also, prospectively, any broadcaster who acquired or established a local daily newspaper would be required to give up its broadcast license within a year after acquiring or establishing the newspaper.

The retroactive provision of the proposed rules would have required divestiture by all existing broadcasters who did not meet the newly created ban on newspaper affiliation. Thus, without regard to the grant and repeated renewal of a broadcast license as being in the public interest and without regard to the quality of the broadcast service provided, any existing broadcaster affiliated with a local daily newspaper would be required to divest itself of either the broadcast station or the newspaper within five years after adoption of the rule. At the time of the "Further Notice," there were more than 400 existing broadcast stations that would have been subject to the proposed divestiture requirement.

In the "Further Notice" the FCC recognized "the far-reaching ramifications that such rules would have" and acknowledged that it had "insufficient information on the subject." (22 F.C.C.2d at 340). In particular, the FCC expressed its "substantial concern" about the possible adverse effects of divestiture. (*Id.* at 348). Accordingly, comments were invited to enable the Commission "to make a careful examination of the matter." (*Id.* at 340). The FCC also recognized that "many will challenge our authority to adopt the rules proposed" and invited comments and legal briefs on that issue. (*Id.* at 349).

The "Further Notice" generated an exhaustive proceeding extending over five years and participated in

by nearly 200 parties. In addition to the National Association of Broadcasters (NAB), parties filing comments with the FCC included the Department of Justice, several citizens groups, the American Newspaper Publishers Association, and numerous broadcasters and newspaper publishers. Extensive studies were undertaken by NAB and by other parties, and detailed documented reports were submitted to the FCC.[1] These studies dealt comprehensively with such topics as (1) the economic consequences of divestiture, (2) the effects of common ownership on competition, (3) the effects of common ownership on station performance, and (4) the multiplicity and diversity of media including the extent of media affiliation.

After consideration of the massive written record as well as three days of oral argument, the FCC announced its decision on the proposed rules in its "Second Report and Order," 50 F.C.C.2d 1046 (1975) (FCC App. 61) (hereinafter referred to as the "Second Report"). In the "Second Report" the FCC first concluded that it had authority under the Communications Act to promulgate the proposed rules and rejected constitutional arguments that the rules would violate the First and Fifth Amendments. (FCC App. 63-67). After summarizing the record before it, the Commission then discussed separately the prospective and the retroactive portions of the proposed rules.

With regard to a prospective rule governing the grant of new broadcast licenses, the Commission decided to promulgate a rule essentially as proposed in

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[1] A list of the parties and the major studies submitted are included in the FCC's "Second Report and Order," 50 F.C.C.2d 1046, 1090-94 (1975) (FCC App. 105-09).

the "Further Notice." (*Id.* 89-93). With respect to the retroactive rule, however, the Commission found that the record demonstrated that "additional public interest considerations" had to be weighed in evaluating the desirability of the "harsh remedy" of divestiture. (*Id.* 89, 98). Weighing these considerations, the Commission decided against compelling divestiture by all affiliated broadcast stations and local daily newspapers as originally proposed and adopted, instead, a narrower divestiture order limited to a defined category of cases. (*Id.* 93-101).

In deciding not to order universal divestiture, the Commission noted that its own staff study of programming data showed that newspaper affiliated television stations had a demonstrated record of "statistically significant superiority" in local news and other local nonentertainment programming as compared to other television stations. (*Id.* 93, n.26). The Commission also found that many of the broadcasters who would be required to divest had established "a long record of service to the public." (*Id.* 93). Many had been pioneers in the earliest years of broadcasting, often with the encouragement of the FCC at a time when broadcasting provided little "hope of profit," and they brought to broadcasting a journalism tradition rather than an interest merely in entertainment. (*Id.*).

The Commission also noted the evidence that universal divestiture would compel many sales substantially below market value, causing not only major losses to the owners but also significant "local economic dislocations." (*Id.*). The Commission also foresaw that the demands for equity capital to finance divestiture would reduce working capital available for programming service. (*Id.* 83, 93). Finally, the Commission was concerned that a massive divestiture order would "reduce local ownership" because "many sales would have to be to outside interests" who were neither concerned with nor knowledgeable about the local community in which the station operated. (*Id.* 93).

In terms of media diversity, the record before the Commission showed that the number of different available publications and broadcast outlets in most markets was already large and increasing. (*Id.* 75-76, 88-89). The record also showed a continued decline in newspaper-television affiliation as a result of normal market forces without the imposition of a divestiture order. (*Id.* 76, 95, n.29). The Commission also found it "an important point" that existing affiliated newspapers and broadcast stations do not necessarily reflect the same viewpoints and that, to the contrary, many have separate managements and independent reporting and editorial policies. (*Id.* 74-75, 104).

The Commission further found that there was not even a claim, much less a showing, that affiliated newspapers and broadcast stations had "committed any specific noncompetitive acts." (*Id.* 87-88). The Commission thus pointedly responded to the Department of Justice's position by observing: "Merely stating that all daily newspaper-VHF television combinations are inconsistent with the public interest and the antitrust laws is not enough." (*Id.* 95, n.29).

Thus, based on its experience and the enormous factual record before it, the Commission found that the public interest would not be served by the drastic step of universal divestiture. The Commission explained that "a mere hoped for gain in diversity is not enough" to justify "disruption for the industry and hardship

for individual owners" that would result from universal divestiture. (*Id.* 93).

> "Having said that our primary concern is diversity in programming service, we have analyzed the question of requiring full-scale divestiture under standards and with regard for considerations which are relevant under our broad public interest mandate. . . . After reviewing the record in this context, we believe that because of the disruption and losses which could be expected to attend divestiture—resulting in losses or diminution of service to the public—divestiture should be limited to use in only the most egregious cases."[3] (*Id.* 95).

Following the "Second Report," several parties filed petitions with the FCC for reconsideration or clarification. The Commission denied the petitions and formally terminated Docket 18110 in its "Memorandum Opinion and Order" dated June 5, 1975. 53 F.C.C.2d 589 (1975) (FCC App. 148-58).

A number of parties, including NAB, thereafter filed timely petitions with the Court of Appeals for the District of Columbia Circuit invoking the court's jurisdiction under 28 U.S.C. § 2342(1) to review the FCC's decision in its "Second Report." The court consolidated the petitions and on March 1, 1977, issued its decision in the consolidated cases. (FCC App. 1-60).

The Court of Appeals, in an opinion by Chief Judge Bazelon, affirmed the FCC's prospective rule, finding it to be rational and within the Commission's statutory

[3] The cases in which divestiture was to be ordered were those markets in which the same entity owned the only daily newspaper and either the only television station or only radio station. There are approximately 16 such markets. (*Id.* 95-99).

authority. (*Id.* 17-29). The court also rejected all constitutional objections raised. (*Id.* 29-33). However, the court reversed the agency's judgment that the case had not been made to justify ordering the sweeping across-the-board divestiture originally proposed. (*Id.* 36-60).

The court conceded that the record before the Commission was barren of any showing that universal divestiture would be in the public interest. In the court's view, "after years of study, the record was essentially inconclusive." (*Id.* 49). Nonetheless, the court held that, even with an "inconclusive" record before it, the FCC "could not rationally conclude" not to order universal divestiture. (*Id.* 57). The court ruled that the FCC was required to adopt "the presumption that cross-owned stations do not serve the public interest." (*Id.* 51). The court asserted that the "presumption" was supported by three sources: the provision in the Communications Act that the FCC is to "encourage the larger and more effective use of radio in the public interest"; the "policies of the First Amendment"; and the FCC's policy "that diversification of media sources is of central importance." (*Id.* 51-52).

Having thus found a "presumption" in favor of universal divestiture, the court next reviewed the competing policies that the FCC had found to weigh against divestiture, and concluded that none of them was sufficiently persuasive in its view to outweigh the "presumption." (*Id.* 52-56). Accordingly, while conceding that any benefits from divestiture "may be speculative," the court held that the FCC was compelled to order divestiture of all affiliated broadcast stations and newspapers in the same locality. (*Id.* 57, 59-60).

Following the Court of Appeals' decision, the FCC asked the court to stay its mandate with respect to the retroactive divestiture rule to permit the agency to seek review of the decision by this Court. The Court of Appeals, by order filed April 5, 1977, granted the request, provided that the Commission file its petition for a writ of certiorari no later than April 22, 1977. (FCC App. 161-67).

In accordance with the stay order, the Commission filed its petition with this Court on April 22, 1977. (No. 76-1471). To permit this Court to consider NAB's petition in conjunction with the FCC's petition, the present petition is also submitted before expiration of the time allowed by statute. 28 U.S.C. § 2201(a).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Decision Would Have a Sweeping Impact on the Communications Media Across the Country.

The Court of Appeals decision, if permitted to stand, would compel a sweeping restructuring of the country's communications media, including both print media and broadcasting. The decision puts in jeopardy the future ownership of more than 150 daily newspapers, some 145 radio stations and 65 television stations serving communities in 44 states.[3] Many of the newspapers and broadcast stations that would be subject to forced sales are locally owned, with deep-rooted community ties and long records of public service.

In economic terms alone, the impact of the decision would be massive. The value of newspaper and broad-

[3] A list of the newspapers and broadcast stations subject to the divestiture requirement is printed as Appendix B to this Petition.

cast properties subject to divestiture is estimated to exceed $2 billion.

As is discussed below,[4] the court in ordering this drastic action expands the reach of the FCC's regulatory authority and carves out a broad gap in the First Amendment for the government to regulate all forms of speech by use of the broadcast licensing power. The court at the same time, having expanded the scope of the FCC's statutory and constitutional authority, wields that power itself by mandating to the agency the policies it must promote, the policies and concerns to which it must give lesser or no weight, and the actions it must take to restructure the communications media.

The net result is that the Court of Appeals acts as the authoritative maker of national communications policy. Its action, in violation of the fundamental First Amendment limits on government power and in gross excess of the court's legitimate judicial review function, should not be permitted to stand.

2. The Ban Against Publication of Local Newspapers By Broadcasters Violates the First Amendment Guarantees of Free Speech and Press and Exceeds the FCC's Statutory Authority.

In constitutional terms, the FCC regulations mandated by the Court of Appeals would issue a blunt command to anyone who wishes to operate a radio or television station: if you want the government's permission to be a broadcaster, you must give up your First Amendment right to publish a daily newspaper in your community. This Court has never sanctioned such a bald infringement of First Amendment rights.

[4] See parts 2 and 3 of the Reasons for Granting the Writ, *infra*.

The rationale given by the FCC and the court to support such a command is diametrically opposed to the fundamental thrust of the First Amendment. Under the rubric of creating greater "diversity" in the communications media, the rules are necessarily premised on a belief by the authorities that certain persons speak "too much," that they are heard "too much" in the debate on public issues, and that they may have proportionately "too much" influence. Accordingly, the solution is to mute those voices so that a more "balanced" chorus will be heard.[8]

The First Amendment, however, is premised on precisely the opposite belief: that truly free debate is most likely to flourish without government intervention. The resulting debate may be undisciplined, out of tune and unbalanced, but that cacophony is preferable to the danger of empowering a federal agency to assume the role of maestro to conduct and control the chorus. As this Court reaffirmed so clearly only last year:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . . [*Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976).]

Nor can the prohibition against publication of a local daily newspaper be defended because it arises in the context of federal licensing. Whether the pen-

[8] In discussing alternative methods for regulating public debate, the Court of Appeals notes: "One way to attempt to equalize debate is by boosting the power of the weaker voice; another way is by reducing the power of the dominant one." (FCC App. 23, n.32).

alty for exercise of First Amendment rights takes the form of direct prohibition or the denial of a privilege is immaterial. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege." *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

Of course, the courts have recognized that the scarcity of available broadcast frequencies provides a practical necessity for governmental involvement in licensing the use of these frequencies. *NBC* v. *United States*, 319 U.S. 190 (1943). However, whatever the wisdom of that doctrine and whatever its current validity in light of technological advances since it was adopted, it is clear that scarcity of broadcast frequencies provides no basis for FCC regulation restricting other media. *Cf., Home Box Office, Inc.* v. *FCC*, —— F.2d —— (No. 75-1280, D.C. Cir., Mar. 25, 1977) (holding unconstitutional on First Amendment grounds portions of the FCC's regulations of cable, as opposed to broadcast, television).

Indeed, it is clear that the regulations here cannot be justified as an attempt to promote diversity *in broadcasting*, for by their nature they are not designed to increase the number of different voices in broadcasting. The regulations would be fully complied with and the FCC satisfied provided that broadcasters simply stop publishing local newspapers. Trading among broadcasters of local stations for distant ones would also satisfy the regulations, again with no increase in the number of broadcast voices either in a single market or nationally. Thus, whatever consid-

erations may affect normal First Amendment doctrine with respect to allocation of scarce broadcasting frequencies, those considerations cannot shield the FCC's regulations here.

In addition to their constitutional infirmities, the FCC's regulations are also invalid because they exceed the agency's authority under the Communications Act. As discussed above, the regulations directly control non-broadcast speech; they are designed to regulate not broadcasting, but rather mass communications generally.[8] Recognizing that the Act provides no specific authority to issue such a rule, the FCC relies upon its general power to grant broadcast licenses to serve the "public interest, convenience and necessity." 47 U.S.C. § 309(a).

This assertion of power, however, is contrary to the Commission's own longstanding interpretation of its authority as not including the power to broadly disqualify newspaper publishers from broadcast licenses. It also is contrary to the consistent Congressional view of the Act. For example, a proposed amendment to the Act in 1952 would have specifically prohibited the FCC from denying a broadcast license because the applicant was engaged in newspaper publishing. The amendment was passed by the House but deleted as "unnecessary" by the Conference Committee, which explained that:

[8] The FCC's sole statutory authority, of course, is to regulate "communications by wire and radio." 47 U.S.C. §§ 151, 152. Although this grant of authority is subject to flexible interpretation to include new technology, such as television, it does not provide any authority to regulate the press or communications generally.

> Under the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or association with, a newspaper or other medium for gathering and disseminating information. [Conference Report No. 2426, 82d Cong., 2d Sess. (1952)].

The same view has also been expressed by the courts. In *Stahlman* v. *FCC*, 126 F.2d 124, 127 (D.C. Cir. 1942), which involved an FCC investigation of newspaper-FM radio affiliation, the court specifically cautioned that the FCC's authority to assess the qualifications of broadcast license applicants "'does not embrace and should not be extended by implication to embrace a ban on newspapers as such." *See also Tri-State Broadcasting Co.* v. *FCC*, 96 F.2d 564, 566 (D.C. Cir. 1938).

The question of the Commission's authority under the Act is not merely a technical one. It presents the critical question of whether the FCC's mandate from Congress is to oversee all the communications media in this country. The power to grant or withhold broadcast licenses was not intended by Congress to be wielded by the FCC as a tool for "reforming" the press to comport with the FCC's masterplan. Particularly in light of the grave constitutional implications of such a power, see *supra* 11-15, it should not be presumed in the absence of clear and express authority from Congress.

3. The Court of Appeals' Requirement That The FCC Must Act Retroactively to Order Divestiture Usurps The FCC's Policy-Making Function.

(a) The Court Deprives the FCC of the Flexibility and Fairness of Prospective Rulemaking.

In ruling that the FCC could not adopt a prospective rule only but *must* also order broadscale divestiture of broadcast stations and newspapers, the Court of Appeals grossly exceeded its legitimate judicial review function. The FCC's "Second Report" was the product of a rulemaking proceeding under Section 4 of the Administrative Procedure Act. 5 U.S.C. §553 (1970). In reviewing such orders, the Court of Appeals' statutory function is to determine whether the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A)(1970). It is axiomatic that the court may not substitute its judgment for that of the agency. *E.g., NLRB* v. *Enterprise Association of Steam Pipefitters Local 638,* 45 U.S.L.W. 414 (Feb. 22, 1977).

Here, however, the court did substitute its judgment for the FCC's. The court, by the palpably makeweight device of creating a "presumption" and the *de novo* weighing of evidence and policies, in effect deprives the FCC of the discretion to regulate by prospective rulemaking. In so doing, the court seriously erodes the agency's authority and deprives the agency of the flexibility of one of the most important tools of administrative regulation.

Prospective rulemaking is a common and important procedure of administrative agencies. Indeed, the flexibility and fairness of prospectivity is one of the major advantages of rulemaking as compared to other forms

of regulation. K. Davis, *Administrative Law* §603 at 142-43 (3d ed. 1972). While an agency may make rules with retroactive effect, the courts have recognized that prospective rules are the norm and retroactivity can be condoned only if required by a public necessity. *E.g., United States* v. *Maher,* 307 U.S. 148 (1939); *NLRB* v. *E & B Brewing Co.,* 276 F.2d 594, 600 (6th Cir. 1960); *Buckeye Cablevision, Inc.* v. *FCC,* 387 F.2d 220, 228 (D.C.Cir. 1967).

This Court has made clear that prospective rulemaking is the preferred method of regulation. In *SEC* v. *Chenery Corporation,* 332 U.S. 194 (1947), the Court recognized that the manner of proceeding is a choice "that lies primarily in the informed discretion of the administrative agency." 332 U.S. at 203. At the same time, the Court also left no doubt as to the preference for prospective rulemaking:

> The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. [*Id.* at 202].

In keeping with this directive, the FCC's longstanding practice has been to prefer prospective rulemaking, and it has often adopted prospective rules without imposing the rule retroactively to require divestiture by existing licensees.[7] In the present rulemaking proceeding, the FCC again acted in precisely this manner as prescribed by this Court in *Chenery;* the Court of Appeals held it was "irrational" for it to do so. (FCC App. 56-57).

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[7] A description of some of the agency's past actions is contained in the FCC's Petition in these cases. FCC Petition at 8-9.

(b) The Court's Controlling "Presumption" is But a Subterfuge for Dictating Policies to the FCC.

The key to the court's decision compelling retroactive application was the creation of a controlling "presumption" that affiliation of a newspaper and a broadcast station is adverse to the public interest. In our view, the record compiled before the Commission demonstrated clearly that existing broadcast stations affiliated with local newspapers have well served the public interest and that any preconceived prejudice against them is factually unsupportable.

There can be no question, however, that at the very least—as the FCC concluded and the Court of Appeals itself conceded—"the record was essentially inconclusive." (FCC App. 49). If the proponents of divestiture could not make their public interest case in an exhaustive proceeding extending over five years, that should be the end of the matter.

It is a basic principle of administrative decisionmaking that "the proponent of a rule or order has the burden of poof." Admin. Proc. Act §7, 5 U.S.C. §556 (d). As a matter of common sense, a showing of an actual problem is a necessary predicate for adoption of a regulation to remedy the problem. ". . . [R]egulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *City of Chicago* v. *FPC,* 458 F.2d 731, 742 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972). It is also the established federal rule that even where a presumption is properly created, a presumption "does not shift . . . the burden of proof in the sense of the risk of nonpersuasion." Fed. R. Evid. 301.

The burden to show the need for a proposed rule has particular force when the proposed rule would have retroactive effect to take away broadcast licenses that have been granted and repeatedly renewed over a period of many years after a finding by the FCC in each case that the license serves the "public interest, convenience and necessity." 47 U.S.C. §309(a). If, suddenly, those findings are to be reversed and hundreds of those licenses are to be found to be contrary to the public interest, a persuasive showing supporting such a result must be required.

The Court of Appeals, however, overcame the fact that there was no showing that existing affiliated newspapers and broadcast stations are contary to the public interest by the simple expedient of assuming that they are. The bases asserted by the court to support the "presumption" are entirely circular. Whether the broad statutory standard of encouraging "larger and more effective use of radio," or First Amendment policies, or FCC policies favoring diversity would in fact be substantially advanced by divestiture was the very question presented in the proceeding. To assume that divestiture would serve these policies is to engage in the ultimate in question-begging.

The court not only ruled that the Commission *could* have engaged in such a process; it held that the Commission was "compelled" to resolve the rulemaking proceeding in that manner. (FCC App. 60). The court was thus using the presumption as if it were a legislative body, creating the kind of controlling legal presumption that is a device for "concealing by fiction a change in the substantive law." *See* F. James, *Civil Procedure* §7.9 (1965). Whatever the propriety of such a presumption if created by Congress or if

developed by the FCC, the Court of Appeals clearly has no authority to engage in such a legislative function.

The impropriety of the court's decision in this respect is well-illustrated by the squarely contrary decision by the same court only three weeks later in *Home Box Office, Inc.* v. *FCC*, —F.2d— (No. 75-1280, D.C. Cir., Mar. 25, 1977). In *Home Box Office*, the Court of Appeals reversed FCC regulations on cable television because, *inter alia*, the FCC had failed to develop a record that showed clearly that the asserted problem addressed by the regulations actually existed. The Commission, said the court, "indulged in speculation and innuendo" in the absence of "a record that shows convincingly a problem to exist." (Slip Op. at 80-81). The court pointedly criticized the Department of Justice's arguments "premised on the unverified assumption that enhancement of competition—actual or potential—is always a good" and warned against basing a rule on "such a presumption." (*Id.* 64-65, n. 73).

It is no doubt frustrating to the Commission to be told by the Court of Appeals on March 1, 1977, that it cannot require a convincing showing that a problem exists before it imposes far-reaching regulations and then to be told by the same Court of Appeals on March 25, 1977, that it must require such a record before acting. To say that the Court of Appeals' diametrically opposed decisions reflect its differing policy preferences with respect to the substantive regulations at issue is little solace. The court's function is to insure that the agency is not arbitrary and capricious, not to require it to be so.

(c) The Court Substitutes Its Own Policies for Those of the FCC

The court's treatment of the competing policies taken into account by the Commission in considering divestiture was equally improper. A few examples illustrate the manner in which the court cavalierly dismissed those factors that were adverse to the result it sought and freely supplanted the FCC's judgment with its own.

For example, in weighing the divestiture question, the FCC expressed grave concern about the effect on the quality of broadcast service that would result from wholesale displacement of existing broadcast station owners. The disruption in continuity of service would mean, the FCC found, that "the new owner would lack the long knowledge of the community and would have to begin raw." (FCC App. 93). Continuity was also recognized as necessary "to give broadcasters an incentive to make the investment required to produce quality programming." (*Id.* 54).

The FCC has extensive experience in observing and evaluating the effect on broadcast service of continuity of ownership and management. In recognition of the public interest benefits of continuity, it has in the past established rules dealing with license transfers and "trafficking". 47 C.F.R. § 1.597 (1976). Its judgment in the present proceeding, relying on its accumulated experience and expertise, was that the loss of continuity would adversely affect broadcast service.

The court, however, dismissed this whole area of consideration as having "scant force in this case," reasoning that "a one-time alteration in the ownership structure of the broadcast industry should not effect

[sic] the public's interest in quality programming because the new owners will become the beneficiaries of any unofficial policy of continuity." (*Id.*). Thus, incredibly, the court dismissed concern about drastic disruption of service because, after the disruption had taken place, "continuity" could begin anew.

The court similarly dismissed in summary fashion the FCC's concern that disruption would be especially harmful because so many of the sales under a broad divestiture order would be to non-local interests. (*Id.* 93). The court simply eliminated this factor with the statement that "even if transfer to non-local owners entails extraordinary disruption, there is no basis for assuming that such transfers will result from divestiture." (*Id.* 55). The court's statement ignores the record, which included, among other things, an extensive and detailed study that analyzed the economic impact of widespread divestiture and concluded that purchasers of many divested stations would be multiple owners and nationwide conglomerates. (*Id.* 78). The statement also ignores the fact that a ban on ownership of a local broadcasting station imposed simultaneously on a large number of broadcasters would almost inevitably lead to widespread trading by local owners for distant stations. (*Id.* 83-84).

In short, having created a "presumption" to fill the void in the record to support divestiture, the court proceeded to eliminate contrary considerations by ignoring the record and replacing the FCC's evaluation of those considerations with its own. The court's action not only drastically affects the structure of the broadcast and print media, but also radically changes the relationship between regulatory agencies and reviewing courts. The decision is contrary to other decisions

of the same court and to the decisions of this Court. It should not be permitted to stand.

CONCLUSION

For the foregoing reasons, we respectfully urge the court to grant a writ of certiorari to review the judgment of the Court of Appeals below.

Respectfully submitted,

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APPENDIX

APPENDIX A

The first Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The relevant provisions of the Administrative Procedure Act of 1946, as amended, are as follows:

> 5 U.S.C. § 556(d):
>
> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.
>
> 5 U.S.C. § 706
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise

reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The relevant provisions of the Communications Act of 1934, as amended, are as follows:

47 U.S.C. § 151:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio . . ., there is created a commission to be known as the "Federal Communications Commission". . . .

47 U.S.C. § 152(a):

The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided. . . .

47 U.S.C. § 309(a):

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the

Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 402(a):

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5.

APPENDIX B

Newspapers and Broadcast Stations Affected by the Court of Appeals Divestiture Order (As of April 15, 1977)

State	City	Newspapers	Broadcast Stations
Alabama	Anniston	*Anniston Star*	WHMA-AM-FM-TV
	Birmingham	*Birmingham News*	WAPI-AM-FM-TV
Arkansas	Camden	*Camden News*	KAMD/KWEH(FM)
	Fort Smith	*Southwest Times Record*	KFSA
	Springdale	*Springdale News*	KBRS
California	Fresno	*Fresno Bee*	KMJ-AM-FM-TV
	Modesto	*Modesto Bee*	KBEE-AM-FM
	Sacramento-Stockton[2]	*Sacramento Bee*	KFBK-AM-FM/ KOVR(TV)
	San Francisco	*San Francisco Chronicle*	KRON(TV)
	San Rafael	*San Rafael Independent-Journal*	KTIM-AM-FM
	Santa Barbara	*Santa Barbara News-Press*	KTMS-AM-FM
	Santa Cruz	*Santa Cruz Sentinel*	KSCO-AM-FM
	Santa Rosa	*Santa Rosa Press Democrat*	KSRD
Connecticut	Stamford	*Stamford Advocate*	WSTC/WYRS(FM)
District of Columbia	Washington[1]	*Washington Star*	WMAL-TV
	Washington	*Washington Post*	WTOP-AM-TV
Florida	Miami	*Miami News*	WIOD/WAIA(FM)
	Tampa	*The Tampa Tribune* and *The Tampa Times*	WFLA-AM-FM-TV
Georgia	Albany	*The Albany Herald*	WALB-TV
	Atlanta	*Atlanta Journal* and *Constitution*	WSB-AM-FM-TV
Hawaii	Honolulu	*Hawaii Times*	KOHO

State	City	Newspapers	Broadcast Stations
Idaho	Coeur d'Alene	*Coeur d'Alene Press*	KVNI
	Idaho Falls	*Idaho Falls Post Register*	KIFI-TV
Illinois	Bloomington	*Bloomington Pantagraph*	WJBC/WBNQ(FM)
	Champaign	*The Champaign News-Gazette*	WDWS-AM-FM
	Chicago	*Chicago Sun-Times* and *Daily News*	WFLD-TV
	Chicago	*Chicago Tribune*	WGN-AM-TV
	Decatur	*Decatur Herald* and *Review*	WSOY-AM-FM
	Effingham	*Effingham News*	WCRA/WCRC(FM)
	Galesburg	*Galesburg Register-Mail*	WGIL/WAAG(FM)
	Jacksonville	*Jacksonville Journal* and *Courier*	WLDS/WEAI(FM)
	LaSalle	*Daily News-Tribune*	WLPO-AM-FM
	Macomb	*Macomb Daily Journal*	WKAI-AM-FM
	Quincy	*Quincy Herald Whig*	WGEM-AM-FM-TV
	Rock Island	*Rock Island Argus*	WHBF-AM-FM-TV
	Waukegan	*Waukegan News-Sun*	WKRS
Indiana	Connersville	*Connersville News-Examiner*	WCNB-AM-FM
	Elkhart	*Elkhart Truth*	WTRC/WYEZ(FM)
	Fort Wayne	*Fort Wayne News-Sentinel*	WGL
	South Bend	*South Bend Tribune*	WSBT-AM-TV/ WWJY(FM)
	Warsaw	*Warsaw Times-Union*	WRSW-AM-FM
Iowa	Burlington	*Burlington Hawkeye*	KBUR-AM-FM
	Cedar Rapids	*Cedar Rapids Gazette*	KCRG-AM-TV
	Dubuque	*Dubuque Telegraph-Herald*	KDTH/KFMD(FM)
	Marshalltown	*Marshalltown Times-Republican*	KFJB-AM-FM
	Mason City	*Globe-Gazette*	KGLO-AM-TV

State	City	Newspapers	Broadcast Stations
Kansas	Arkansas City	*Arkansas City Traveler*	KSOK
	Coffeyville	*Coffeyville Journal*	KGGF
	Dodge City	*Dodge City Daily Globe*	KGNO-AM-FM
	Garden City	*Garden City Telegram*	KIUL
	Manhattan	*Manhattan Mercury*	KMAN/KMKF(FM)
	McPherson	*McPherson Sentinel*	KNEX-AM-FM
	Topeka	*Topeka State Journal* and *Capital*	WIBW-AM-FM-TV
Kentucky	Bowling Green	*Park City Daily News*	WKCT/WDNS(FM)
	Corbin	*Corbin Times-Tribune*	WCTT-AM-FM
	Louisville	*Louisville Courier-Journal* and *Times*	WHAS-AM-TV/ WNNS(FM)
	Owensboro	*Owensboro Messenger* and *Inquirer*	WOMI/WBKR(FM)
	Paducah	*Paducah Sun-Democrat*	WPSD-TV
Louisiana	Baton Rouge	*Baton Rouge Advocate* and *State Times*	WJBO/WFMF(FM)/ WBRZ(TV)
	Shreveport	*Shreveport Journal*	KSLA-TV
	Shreveport[2]	*Shreveport Times*	KWKH/KROK(FM)
Maine	Portland	*Portland Express* and *Portland Press Herald*	WGAN-AM-FM-TV
Maryland	Baltimore	*Baltimore News-American*	WBAL-AM-FM-TV
		Baltimore Sun	WMAR-FM-TV
Massachusetts	Brockton	*Brockton Enterprise & Times*	WBET/WCAV(FM)
	Northampton	*Northampton Hampshire Gazette*	WHMP-AM-FM
	Worcester	*Worcester Telegram, The Evening Gazette* and *The Sunday Telegram*	WTAG
Michigan	Albion	*Albion Recorder*	WALM
	Benton Harbor	*The Herald Palladium*	WHFB-AM-FM
	Detroit	*Detroit News*	WWJ-AM-FM-TV
	Owosso	*Owosso Argus Press*	WOAP-AM-FM

State	City	Newspapers	Broadcast Stations
Minnesota	New Ulm	*New Ulm Daily Journal*	KNUJ-AM-FM
Mississippi	Columbus	*Columbus Commercial Dispatch*	WCBI-AM-TV
	Greenville	*Delta Democrat-Times*	WDDT
	Jackson	*Jackson Clarion-Ledger* and *Daily News*	WSLI/WJFR(FM)/ WJTV(TV)
	Meridian	*Meridian Star*	WMOX
	Meridian	*Meridian Star*	WTOK-TV
Missouri	Columbia	*Columbia Daily Tribune*	KFRU
	St. Louis	*St. Louis Post-Dispatch*	KSD-AM-TV
	St. Louis	*St. Louis Globe-Democrat*	KTVI(TV)
	Warrensburg	*Warrensburg Star-Journal*	KOKO
Montana	Miles City	*Miles City Star*	KATL
Nebraska	Hastings	*Hastings Tribune*	KHAS-AM-TV
	Norfolk	*Norfolk Daily News*	WJAG-AM-FM
Nevada	Las Vegas	*Las Vegas Review-Journal*	KORK-AM-FM-TV
New Jersey	Asbury Park	*Asbury Park Press*	WJLK-AM-FM
New Mexico	Grants	*Grants Daily Beacon*	KMIN
New York	New York	*New York Daily News*	WPIX-FM-TV
		New York Times	WQXR-AM-FM
	Olean	*Olean Times-Herald*	WHDL/WEBF(FM)
	Rochester	*Rochester Democrat* and *Chronicle* and *Rochester Times-Union*	WHEC-TV
	Syracuse	*Syracuse Post-Standard* and *Herald-Journal*	WSYR-AM-FM-TV
	Watertown	*Watertown Daily Times*	WWNY-AM-TV
North Carolina	Asheboro	*Asheboro Courier-Tribune*	WGWR/WCSE(FM)
	Asheville	*Asheville Citizen-Times*	WWNC
	Durham	*Durham Herald* and *Sun*	WDNC/WDCG(FM)
	Hickory	*Hickory Record*	WHKY-AM-FM-TV

State	City	Newspapers	Broadcast Stations
North Dakota	Fargo	*The Fargo Forum*	WDAY-AM-FM-TV
Ohio	Akron	*Akron Beacon-Journal*	WAKR-AM-TV/ WAEZ(FM)
	Ashtabula	*The Ashtabula Star-Beacon*	WREO-AM-FM
	Cincinnati	*Cincinnati Post*	WCPO-TV
	Cleveland	*Cleveland Press*	WEWS-TV
	Columbus	*Columbus Dispatch*	WBNS-AM-FM-TV
	Dayton	*Dayton News* and *Journal-Herald*	WHIO-AM-FM-TV
	Elyria	*The Elyria Chronicle-Telegram*	WEOL/WBEA(FM)
	Findlay	*Findlay Courier*	WFIN/WHMQ(FM)
	Newark	*Newark Advocate & American Tribune*	WCLT-AM-FM
	Warren	*Warren Tribune-Chronicle*	WHHH
	Wooster	*Wooster Daily Record*	WWST-AM-FM
	Youngstown	*Youngstown Vindicator*	WFMJ-AM-TV
Oklahoma	Ardmore	*Ardmore Ardmoreite*	KVSO
	Durant	*Durant Democrat*	KSEO-AM-FM
	Enid	*Enid News-Eagle*	KCRC/KNID-FM
	Oklahoma City	*Oklahoma City Oklahoman* and *Times*	WKY
	Ponca City	*Ponca City News*	WBBZ
	Shawnee	*Shawnee News-Star*	KGFF
	Stillwater	*Stillwater News-Press*	KSPI-AM-FM
Oregon	Grants Pass	*Grants Pass Courier*	KAGI
	Portland	*Portland Oregonian* and *Oregon Journal*	KOIN-AM-FM-TV
Pennsylvania	Clearfield	*Clearfield Progress*	WCPA-AM-FM
	DuBois	*DuBois Courier Express*	WCED-AM-FM
	Easton	*Easton Express*	WEEX/WQQQ(FM)
	Erie	*Erie Morning News* and *Times*	WSEE(TV)
	Gettysburg	*Gettysburg Times*	WGET-AM-FM
	Harrisburg	*Harrisburg Patriot* and *News*	WTPA-FM-TV

State	City	Newspapers	Broadcast Stations
	Huntingdon	*Huntingdon News*	WHUN/WRLR(FM)
	Johnstown	*Johnstown Tribune-Democrat*	WJAC-AM-FM-TV
	Lancaster	*Lancaster Intelligencer Journal* and *New Era*	WGAL-TV
	Lansdale	*North Penn Reporter*	WNPV
	Pittsburgh	*Pittsburgh Post-Gazette*	WWSW/WPEZ(FM)
	Reading	*Reading Times* and *Eagle*	WEEU
	Scranton	*Scranton Times*	WEJL/WEZX(FM)
Rhode Island	Providence	*Providence Journal Bulletin*	WEAN/WPJB(FM)
	Woonsocket	*Woonsocket Call*	WWON-AM-FM
South Carolina	Anderson	*Anderson Independent* and *Daily Mail*	WAIM-AM-TV/ WCAC(FM)
	Greenville[2]	*Greenville News* and *Piedmont*	WFBC-AM-FM-TV
	Orangeburg	*Orangeburg Times & Democrat*	WTND
Tennessee	Johnson City	*Johnson City Press-Chronicle*	WETB
	Knoxville	*Knoxville-News Sentinel*	WNOX
	Memphis	*Commercial Appeal* and *Memphis Press-Scimitar*	WMC-AM-FM-TV
Texas	Dallas	*The Dallas Times Herald*	KDFW-TV
	Dallas	*Dallas Morning News*	WFAA-AM-TV/ KZEW(FM)
	Fort Worth	*Fort Worth Star-Telegram*	WBAP/KSCS(FM)
	Houston	*Houston Post*	KPRC-AM-TV
	Temple	*Temple Telegram*	KCEN-TV
	Texarkana	*The Texarkana Gazette-News*	KCMC/KTAL-FM-TV
Utah	Salt Lake City	*Deseret News*	KSL-AM-FM-TV

State	City	Newspapers	Broadcast Stations
Virginia	Fredericksburg	*Fredericksburg Free Lance-Star*	WFLS-AM-FM
	Newport News	*Newport News Daily Press* and *Times-Herald*	WGH-AM-FM
	Norfolk	*Norfolk Ledger-Star* and *Virginian-Pilot*	WTAR-AM-TV/ WKEZ(FM)
Washington	Spokane	*Spokane Chronicle*	KHQ-AM-FM-TV
	Tacoma	*Tacoma News-Tribune*	KTNT/KNBQ(FM)
West Virginia	Bluefield	*Bluefield Daily Telegraph*	WHIS-AM-TV/ WHAJ(FM)
	Morgantown	*The Morgantown Dominion-Post*	WAJR-AM-FM
Wisconsin	Janesville	*Janesville Gazette*	WCLO/WJVL(FM)
	Madison	*Capital Times*	WIBA-AM-FM
	Milwaukee	*Milwaukee Journal* and *Sentinel*	WTMJ-AM-TV/ WKTI(FM)
	Wisconsin Rapids	*Wisconsin Rapids Tribune*	WFHR/WRW(FM)
Wyoming	Cheyenne	*Wyoming Eagle* and *Wyoming State Tribune*	KFBC-AM-FM
Puerto Rico	San Juan	*El Mundo*	WKAQ-AM-FM-TV

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[1] Agreement to sell or exchange cross-owned holding(s) has been announced.

[2] FCC notice of application for reassignment of cross-owned station tendered for filing or accepted by the Commission.

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1595

(Consolidated with Nos. 76-1471, 76-1521, 76-1604, 76-1624, and 76-1695)

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1595

(Consolidated with Nos. 76-1471, 76-1521, 76-1604, 76-1624, and 76-1685)

National Association of Broadcasters,
Petitioner,

v.

Federal Communications Commission
and
United States of America,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Second Report and Order of the Federal Communications Commission (FCC) is reported at 50 F.C.C.2d 1046 (1975) (Joint Appendix (JA) 134). The FCC's Memorandum Opinion and Order, denying petitions for reconsideration of the Second Report and Order, is reported at 53 F.C.C.2d 589 (1975) (JA 317).

The opinion of the United States Court of Appeals for the District of Columbia Circuit, affirming portions of the FCC's order and vacating and remanding other portions, is reported at 555 F.2d 938 (1977) (JA 339). The court's further opinion, granting a motion to stay a portion of its mandate, is reported at 555 F.2d 967 (1977) (JA 437).

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1977. Pursuant to 28 U.S.C. § 2350(a), the National Association of Broadcasters (NAB) filed its Petition for a Writ of Certiorari on May 13, 1977. The Petition was granted by this Court on October 3, 1977. This case has been consolidated for review with five other cases [1] in which Petitions for Certiorari were also granted on October 3, 1977. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom . . . of the press . . . ."

The relevant sections of the Communications Act, appearing at 47 U.S.C. §§ 151, 152(a), 303(g), and 309(a), and the relevant sections of the Administrative

[1] *FCC* v. *National Citizens Comm. for Broadcasting* (No. 76-1471); *Channel Two Television Co.* v. *National Citizens Comm. for Broadcasting* (No. 76-1521); *American Newspaper Publishers Ass'n* v. *National Citizens Comm. for Broadcasting* (No. 76-1604); *Illinois Broadcasting Co.* v. *National Citizens Comm. for Broadcasting* (No. 76-1624); *Post Co.* v. *National Citizens Comm. for Broadcasting* (No. 76-1685).

Procedure Act, appearing at 5 U.S.C. §§ 556(d) and 706, are reprinted in the Appendix to this brief.

The regulations adopted by the FCC in its Second Report and Order appear as amendments to §§ 73.35, 73.240, and 73.636 of the Commission's Rules and Regulations, and are reprinted as Appendix F to that Report and Order, 50 F.C.C.2d 1046, 1099-1106 (JA 243-63).

QUESTIONS PRESENTED

1. Whether an FCC rule prohibiting broadcasters from publishing daily newspapers in their local communities exceeds the FCC's statutory authority and abridges First Amendment rights.

2. Whether the Court of Appeals erred in finding "irrational" the FCC's decision to apply its new licensing policy prospectively only, rather than retroactively to require divestiture by existing licensees previously found to serve the public interest.

3. Whether the Court of Appeals erred in compelling the FCC to adopt a presumption that no existing broadcast stations affiliated with a local newspaper are in the public interest and that all must be divested.

4. Whether the Court of Appeals erred in ordering the FCC to conclude that a hoped-for increase in diversity is more important than all other competing public interest considerations and must be given controlling weight, notwithstanding the FCC's own contrary assessment of the relevant considerations.

STATEMENT OF THE CASE

This case concerns a Federal Communications Commission rulemaking proceeding, FCC Docket 18110,

dealing with the publication of newspapers by radio and television broadcasters.

The portion of the rulemaking proceeding here at issue began in 1970 with the FCC's issuance of a Further Notice of Proposed Rulemaking (Further Notice), 22 F.C.C.2d 339 (1970) (JA 101). The rules proposed in the Further Notice contained both prospective and retroactive provisions. In essence, the prospective provision would have banned the issuance of a new radio or television license to any applicant who directly or indirectly owned, operated, or controlled a daily newspaper in the community to be served by the broadcast station. In addition, any broadcaster who acquired or established a local daily newspaper would have been required to give up its broadcast license within a year after acquiring or establishing the newspaper.

The retroactive provision of the proposed rules would have required divestitures by all existing broadcasters who did not meet the newly created ban on local newspaper affiliation. Thus, without regard to the grant and repeated renewal of a broadcast license as being in the public interest, and without regard to the quality of broadcast service provided, any existing broadcaster affiliated with a daily newspaper in the same community would have been required to divest itself of either the broadcast station or the newspaper within five years after adoption of the rule.

In the Further Notice, the FCC recognized "the far-reaching ramifications that such rules would have" and acknowledged that it had "insufficient information on the subject." 22 F.C.C.2d at 340 (JA 103). In particular, the FCC expressed its "substantial concern"

about the possible adverse effects of divestiture. *Id.* at 348 (JA 119). Accordingly, comments were invited to enable the Commission "to make a careful examination of the matter." *Id.* at 340 (JA 104). The FCC also recognized that "many will challenge our authority to adopt the rules proposed" and invited comments and legal briefs on that issue. *Id.* at 349 (JA 121).

The Further Notice generated an exhaustive proceeding extending over five years and participated in by nearly 200 parties. In addition to NAB, parties filing comments with the FCC included the Department of Justice, several citizens groups, the American Newspaper Publishers Association, and numerous broadcasters and newspaper publishers. Extensive studies were undertaken by NAB and by other parties, and detailed documented reports were submitted to the FCC.[2] These studies dealt comprehensively with such topics as (1) the multiplicity and diversity of media, including the extent of media affiliation, (2) the effects of common ownership on competition, (3) the effects of common ownership on station performance, and (4) the economic consequences of divestiture.

After consideration of both the extensive written record and three days of oral argument, the FCC announced its decision on the proposed rules in its Second Report and Order (Second Report), 50 F.C.C.2d 1046 (1975) (JA 134). In the Second Report, the FCC first concluded that it had authority under the Communications Act to promulgate the proposed rules, and it rejected constitutional arguments that the rules

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[2] A list of the parties and the major studies submitted is included in the FCC's Second Report and Order as Appendix A. 50 F.C.C.2d 1046, 1090-94 (1975) (JA 221-25).

would violate either the First or Fifth Amendments. 50 F.C.C.2d at 1048-52 (JA 138-46).

After summarizing the record before it, the Commission then discussed separately the prospective and retroactive portions of the proposed rules. The separate treatment was made necessary by several factors uniquely affecting the retroactive proposal: the fact that "divestiture . . . was a departure from the typical Commission approach of limiting any new rules to prospective effect"; the "impact on industry structure" flowing from divestiture; and the substantive differences in the proposed retroactive rule itself. *Id.* at 1047 (JA 137). These considerations persuaded the Commission that the prospective and retroactive proposals had to be "examined separately and tested against appropriate criteria." *Id.* (JA 137).

With regard to a prospective rule governing the grant of new broadcast licenses, the Commission decided to promulgate a rule essentially as proposed in the Further Notice. *Id.* at 1074-78 (JA 190-96). The FCC's basis for adopting the prospective rule was that "any new licensing should be expected to add to local diversity." *Id.* at 1075 (JA 191). Where existing licenses were not divested, the Commission judged itself "free to act to foster diversity without being concerned about negative impact from our action." *Id.* at 1081 (JA 203).

With respect to the retroactive rule, however, the Commission concluded that "more than just theory" or a "hoped for gain in diversity" was required. *Id.* at 1074, 1078 (JA 188, 198). Instead, because of the "substantial impact" flowing from divestiture, it "should be required only when we can determine that

it is required by the public interest." *Id.* at 1080 n.29 (JA 201). Thus, although the Commission viewed the promotion of diversity as an "importan[t]" and "primary" concern, such promotion was "not the only point to consider" in connection with the divestiture proposal. *Id.* at 1078, 1080 (JA 197, 200). Rather, the record demonstrated that "additional public interest considerations" had to be weighed in evaluating the desirability of the "harsh remedy" of divestiture. *Id.* at 1074, 1083 (JA 188, 207). Weighing these considerations, the Commission concluded that "because of the disruption and losses which could be expected to attend divestiture—resulting in losses or diminution of service to the public—divestiture should be limited to use in only the most egregious cases." *Id.* at 1080 (JA 201-02).

In deciding not to order universal divestiture, the Commission relied on a variety of public interest considerations. It noted that its own staff study of programming data showed that newspaper-affiliated television stations had a demonstrated record of "statistically significant superiority" in local news and other local nonentertainment programming as compared to other television stations. *Id.* at 1078 n.26 and Appendix C (JA 198 and 230-41). The Commission also found that many of the broadcasters who would be required to divest had established "a long record of service to the public." *Id.* at 1078 (JA 198). It furthermore emphasized that many of these licensees had been pioneers in the earliest years of broadcasting, at a time when there was little "hope of profit," and that were it not for their efforts service in many areas would have been delayed. *Id.* at 1074, 1078 (JA 190, 197-98).

The Commission also noted the evidence that universal divestiture could compel many sales below market

value, increase interest rates, and cause "[l]ocal economic dislocations." *Id.* at 1078 (JA 197). The Commission in addition foresaw that the demands for equity capital to finance divestiture could reduce working capital available for programming service. *Id.* at 1068, 1078 (JA 178, 197). The Commission was concerned that a massive divestiture order would "reduce local ownership" because "many sales would have to be to outside interests" who were neither concerned with, nor knowledgeable about, the local community in which the station operated. *Id.* (JA 197).

Regarding media diversity, the Commission pointed out that only 10.4 percent of the commercial television stations were owned wholly or partly in common with daily newspapers, that this percentage was far below the 48 percent figure that obtained in 1948, and that "a similar pattern of a continuing separation of daily newspapers and television stations" could be observed during the years of the rulemaking proceeding itself. *Id.* at 1080 n.29 (JA 201-02). It was the Commission's opinion that further separations would result both from this normal market pattern and from its adoption of a rule prohibiting new newspaper-broadcaster combinations. *Id.* (JA 202). The Commission furthermore considered it "an important point" that existing affiliated newspapers and broadcast stations are not operated as single entities "speaking with one voice"; to the contrary, the record showed that most have separate managements and facilities, and independent reporting and editorial policies. *Id.* at 1089; *see also id.* at 1059-60 (JA 219-20; 161-62).

The Commission further found that there was not even a claim, much less a showing, that affiliated newspapers and broadcast stations had "committed any specific noncompetitive acts." *Id.* at 1072. (JA 186). The Commission thus pointedly responded to the Department of Justice's position by observing: "Merely stating that all daily newspaper-VHF television combinations are inconsistent with the public interest and the anti-trust laws is not enough." *Id.* at 1080 n.29 (JA 201).

Thus, based on its experience and the enormous factual record before it, the Commission found that the public interest would not be served by the drastic step of universal divestiture. It chose instead to limit its divestiture order to those 16 markets where the sole daily newspaper and the sole broadcast station were commonly controlled. *Id.* at 1081-84 (JA 204-09). Basing a divestiture rule on monopoly considerations, said the Commission, "is a far cry from one based only on some theoretical increase in already existing diversity which might follow from such action and would ignore the ramifications of such a step. Accordingly, we do not believe that further divestiture can be defended." *Id.* at 1083 (JA 207).

Following the Second Report, several parties filed petitions with the FCC for reconsideration or clarification. The Commission denied the petitions and formally terminated Docket 18110 in its Memorandum Opinion and Order dated June 15, 1975. 53 F.C.C.2d 589 (1975) (JA 317).

A number of parties, including NAB, timely petitioned the Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 2342(1), requesting review of the FCC's decision in its Second Report. The court consolidated the petitions and on March 1, 1977 issued its decision in the consolidated cases. 555 F.2d 938 (1977) (JA 339).

The Court of Appeals, in an opinion by Chief Judge Bazelon, affirmed the FCC's prospective rule, finding it to be rational and within the Commission's statutory authority. *Id.* at 947-52 (JA 362-81). The court also rejected all constitutional objections raised. *Id.* at 953-54 (JA 381-88). However, the court reversed the agency's decision not to require the sweeping, across-the-board divestiture originally proposed; it furthermore ordered the agency, on remand, to require such divestiture. *Id.* at 965-67 (JA 426-31).

Following the Court of Appeals' decision, the FCC moved the court to stay its mandate with respect to the retroactive divestiture rule to permit the agency to seek review of the decision by this Court. The Court of Appeals, by order filed April 5, 1977, granted the motion. 555 F.2d at 970 (JA 444).

NAB filed its Petition for a Writ of Certiorari on May 13, 1977. This Court granted the Petition on October 3, 1977, and consolidated the case with five other cases in which it granted Petitions for Certiorari on the same date.

SUMMARY OF ARGUMENT

The FCC regulations before this Court exceed the agency's authority under the Communications Act to regulate "communications by wire and radio." They represent an unprecedented Commission attempt to regulate all forms of mass communication, including not only the broadcast media, but the print media as well. In so doing, they conflict with the agency's own longstanding interpretation of its authority, the intent of Congress as expressed in the legislative history, and unanimous judicial opinion, all of which have consistently denied that the Act empowers the Commission to exclude newspaper publishers from broadcasting.

The sanctions imposed in the present regulations not only exceed the statutory grant, but they violate the First Amendment as well. By conditioning the grant of a broadcast license upon an applicant's forfeiture of the right to publish a local newspaper, the regulations unconstitutionally abridge the freedom of the press. They do this on the mistaken premise that government may abridge speech in order to achieve diversity. The Constitution shields newspapers from all such governmental efforts, and immunizes them from laws not of general application. Thus, although regulations refusing licenses to broadcasters or publishers engaging in anticompetitive practices violative of general antitrust policies might have been constitutionally permissible, these regulations sweep far beyond any legitimate regulatory purpose, and therefore cannot withstand the exacting scrutiny which the First Amendment requires.

If, however, the FCC's regulations are determined to be in accordance with statutory and constitutional law, then the Court of Appeals' review of those regulations was limited to the question whether they were arbitrary or capricious. The regulations could in no event be supplanted by the court's own judgment as to a wiser regulatory scheme. But that is what occurred here. Adhering to well-established policies against retroactive rulemaking, taking into account the sharp break from previous practice presented by its new rule, and weighing the harm to the public interest threatened by widespread divestitures of existing licensees, the Commission exercised its discretion against universal divestiture of all newspaper affiliates. The Court of Ap-

peals set this reasoned judgment aside, and ordered the FCC to apply the ban retroactively as well. In so doing, the lower court impermissibly intruded upon the agency's prerogative to apply its rule prospectively, inexplicably compelled the agency to adopt a "presumption" against all newspaper-affiliated broadcasters, and unjustifiably substituted its own balancing of the competing policy interests in determining whether divestiture would be in the public interest.

ARGUMENT

I.

THE REGULATIONS EXCEED THE FCC'S STATUTORY AUTHORITY UNDER THE COMMUNICATIONS ACT

The regulations adopted by the FCC in its Second Report, as expanded by the Court of Appeals in its decision below, prohibit any broadcaster from establishing, acquiring, or owning a local daily newspaper and prohibit any daily newspaper publisher from operating a radio or television station in his community. The Communications Act grants no authority to the FCC to promulgate such regulations, and the FCC's action directly contravenes Congress' express intention that "the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or an association with, a newspaper."[3] Moreover, if the Act did grant such authority, it would be an unconstitutional abridgement of rights protected by the First Amendment. The

[3] Conf. Rep. No. 2426, 82d Cong., 2d Sess. 15 (1952). *See* legislative history discussed *infra* at 18-20.

lack of statutory authority is discussed below, and the constitutional infirmity of the regulations is then treated in the following section.

A. The Regulations Reach Beyond "Communication by Wire and Radio" and Attempt to Control All Communications Media

The FCC's sole authority under the Communications Act of 1934 is to regulate "communications by wire and radio."[4] The regulations here exceed the bounds of this statutory grant by attempting to regulate the whole of the mass communications media, including not only wire and radio, but the print media as well. Neither in their purpose nor in their application can the regulations be defended as an attempt to regulate broadcasting alone.

Both the Commission and the Court of Appeals readily acknowledged that the regulations were an effort by the FCC to restructure the mass communications media generally. Thus, in the court below, the Commission described its regulations as designed "to promote greater diversity of ownership of the mass communications media." FCC Ct. App. Brief at 2. It rationalized this expansion of its regulatory reach to include newspapers as well as broadcasting on the ground that "both are sources of news and opinion." *Id.* at 31. Similarly, the Court of Appeals at the outset of its opinion declared that the subject of the regulations was "media ownership concentration." 555 F.2d

[4] Section 1 of the Act provides that the FCC is created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151 (1970). Section 2 defines the scope of the Act by providing that it "shall apply to all interstate and foreign communication by wire or radio." 47 U.S.C. § 152(a) (1970).

at 943 (JA 346). The court found that the regulations were the outgrowth of the Commission's concern with "the public interest in a diversified mass communications media" and were based upon the "promotion of media competition and maximum diversification of media viewpoints." *Id.* at 944, 945 (JA 350, 353-54).

These descriptions of the purpose and scope of the regulations necessarily speak broadly in terms of "mass communications media," "sources of news and opinion," "media ownership," "media competition," and "media viewpoints," rather than broadcasting only. This is because, while the rationale for the regulations is the promotion of diversity, by their very nature they do not and cannot promote diversity *in broadcasting*. They do not increase the number of broadcasting channels available; nor do they increase the number of different persons operating broadcast stations. Instead, they bar broadcasters from local newspaper publishing and exclude local newspaper publishers as a class from eligibility to hold broadcast licenses solely because of their role in the nonbroadcasting media.

The regulations would be fully complied with if all existing and would-be broadcasters simply stopped publishing newspapers in their local communities. Alternatively, if existing broadcasters traded their broadcast stations with other broadcasters in distant markets so that they no longer broadcast and publish in the same community, the regulations again would be satisfied. Finally, newspaper publishers could give up their broadcast licenses altogether in order to continue publishing. None of these options would increase broadcasting diversity, either in terms of the number of different broadcasting voices in any local market or in the aggregate number of broadcasters nationally.

The FCC concedes that its regulations are not based on any finding that a broadcaster's affiliation with a local newspaper publisher detracts from its broadcast performance. To the contrary, in repeated license renewals the FCC has found that such broadcasters serve the public interest, and in the Second Report it again acknowledged their "long record of service to the public." 50 F.C.C.2d at 1078 (JA 198). Indeed, the FCC's own staff study showed that broadcasters affiliated with newspapers have demonstrated "statistically significant superiority" in the critical area of local programming, including local news and public affairs. *Id.* at 1078 n.26 and App. C. (JA 198 and 230-41). Nor did the record show any evidence that affiliated broadcasters have any unfair economic advantage, have engaged in improper practices, or have limited competition in broadcasting. Thus, the Commission made clear that "[n]o claims were made that newspaper-television station owners have committed any specific non-competitive acts as such" and that its regulations were "not in the least premised on the existence of improprieties in the operation of the media holdings." *Id.* at 1072, 1085 (JA 186, 211).

The present regulations thus are fundamentally different from past FCC actions such as its so-called "duopoly" or "one-to-a-market" rules and its chain broadcasting regulations.[5] Those regulations are also premised upon a theory of diversity, but unlike the present Order, they seek to increase diversity within broadcasting, not in the communications media generally. Here, in contrast, both by design and effect the FCC has set out to regulate all of the mass communications media.

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[5] 47 C.F.R. §§ 73.35, 73.136, 73.240, 73.636 (1976).

The limitation of the FCC's authority to the regulation of "communication by wire and radio" marks the outer boundary of permissible FCC action, and Commission regulations can be valid only if their subject matter lies within the sphere thus committed to the agency. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167-68, 178 (1968); *see United States* v. *Midwest Video Corp.*, 406 U.S. 649, 675-76 (1972) (Burger, C.J., concurring in the result). Even if the Constitution permitted Congress to give such power to any agency, which we believe it does not, Congress has not given the authority to the FCC in the Communications Act to regulate the mass communications media as the Commission has attempted to do here.

B. Congress, the Courts and the FCC Itself Have Consistently Found the FCC to Lack the Authority to Exclude Newspaper Publishers from Broadcasting

As discussed above, the plain words of the Communications Act negate any claim of authority for the Commission's attempt to expand its mandate to sweep across all forms of communications media, including the press. Moreover, in every prior instance in which the question has arisen whether the Commission has authority to exclude newspaper publishers from obtaining broadcast licenses, the consistent answer by Congress, by the courts, and by the FCC itself has been in the negative.

The leading judicial decision denying the FCC's authority to promulgate such a regulation is *Stahlman* v. *FCC*, 126 F.2d 124 (D.C. Cir. 1942). *Stahlman* presented the question of the enforceability of a subpoena issued by the FCC in connection with an investigation of newspaper-broadcast affiliation. While the court upheld the subpoena, it squarely rejected any suggestion that the FCC had the authority under the Act to preclude newspaper publishers from operating broadcast stations. The court found that such a rule or policy would be "wholly outside of and beyond any of the powers with which Congress has clothed the Commission." 126 F.2d at 127. The court explained:

> [W]e have previously held that there is nothing in the Act which either prevents or prejudices the right of a newspaper, as such, to apply for and receive a license to operate a radio broadcast station. Tri-State Broadcasting Co. v. Federal Communications Comm., 68 App. D.C. 292, 96 F.2d 564. Further consideration confirms that view.
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> * * *
>
> [The authority to assess the qualifications of applicants for broadcast licenses] does not embrace and should not be extended by implication to embrace a ban on newspapers as such, for in that case it would follow that the power to exclude exists also as to schools and churches; and if to these, the interdict might be applied wherever the Commission chose to apply it. This, we think, would be in total contravention of that equality of right and opportunity which Congress has meticulously written into the Act, and likewise in contravention of that vital principle that whatever fetters a free press fetters ourselves. In this view, we need not consider whether the power exists even in Congress, for *Congress has not undertaken, and probably never will undertake, to delegate such power to the Commission.* [*Id.* (emphasis added).][*]

[*] The *Stahlman* decision on this point was subsequently cited with approval by the same court in *McClatchy Broadcasting Co.* v. *FCC*, 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957). Until the decision below, no court had ever found to the contrary.

Following this decision by the Court of Appeals, the Commission terminated its investigation and declined to promulgate any regulations concerning newspaper-radio affiliation, citing specifically the "grave legal and policy questions involved." 9 Fed. Reg. 702 (1944). Instead, the Commission forwarded the results of its investigation to Congress for its consideration. *Id.*

The court's decision in *Stahlman* and the FCC's action transmitting the results of its investigation to Congress rather than acting itself were both consistent with the FCC's own longstanding interpretation of the Act as not conferring the authority to bar newspaper publishers from eligibility for broadcast licenses. As early as January 1937, less than three years after passage of the Communications Act, the agency specifically considered the question whether its licensing power could be used to deny radio licenses to newspaper publishers. The Commission, in a formal opinion by its first General Counsel, Hampson Gary, concluded that the Act gave it no such power. (JA 445).[7] The opinion was transmitted to both houses of Congress.

The FCC consistently adopted the same view of its power for nearly four decades, up to the time the present rule was adopted. Most noteworthy, it repeated that position before Congress on at least two separate occasions and thereby succeeded in dissuading Con-

[7] Mr. Gary summarized his conclusion as follows:

> In my opinion, therefore, the Commission does not have the authority, under the existing law and in the absence of an expression of public policy on the subject by the Congress, to deny an application to a newspaper owner for radio facilities solely upon the ground that the granting of such an application would be against public policy. (JA 449).

gress from enacting amendments to the Act that would have expressly prohibited the Commission from adopting such a rule.

In 1947, legislation was considered that would have expressly prohibited the Commission from taking such an action.[8] Following testimony by the FCC Chairman that the proposal in fact reflected the agency's practice under the existing statute,[9] further consideration of the proposal was terminated.

A second major Congressional reexamination of the Communications Act began in 1949 and culminated in the 1952 Communications Act Amendments. Again, a proposal was made to add a provision that would confirm that the Act conferred no power upon the FCC to promulgate any rule or procedure excluding newspaper publishers or discriminating against them in broadcast licensing,[10] and again the FCC Chairman testified that the FCC had no such authority under the existing statute.[11] The Senate Committee decided to delete the provision from the bill, explaining:

> It should be distinctly understood that in eliminating the section the committee has done so solely because the Commission is now following the procedure which was outlined in the section, has testified that it intends to follow that procedure, and

[8] The proposal was the White-Wolverton Bill, S. 1333, 80th Cong., 1st Sess. § 25 (1947).

[9] Hearings on S. 1333 Before Sen. Comm. on Interstate & For. Commerce, 80th Cong., 1st Sess. 44, 69-70 (1947) (testimony of FCC Chairman Denny).

[10] The proposal was S. 1973, 81st Cong., 1st Sess. § 14 (1949).

[11] Hearings on S. 1973 Before Sen. Comm. on Interstate & For. Commerce, 81st Cong., 1st Sess. 20-21, 103-04 (1949) (testimony of Acting FCC Chairman Hyde).

> that it is of the opinion that it has no legal or constitutional authority to follow any other procedure. [S. Rep. No. 741, 81st Cong., 1st Sess. 3 (1950).]

Following this action by the Senate, the joint House-Senate Conference decided to adopt the same approach in reconciling the different versions of the bill as passed by the two houses. The Conference Committee explained that the provision was omitted solely because it was "unnecessary" since:

> [U]nder the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or an association with, a newspaper .... [Conference Report No. 2426, 82d Cong., 2d Sess. 15 (1952).]

Thus, Congress has specifically considered precisely the question now before this Court and, expressly relying on the FCC's own longstanding interpretation and the reaffirmation of that interpretation before Congress, it left no doubt that the Act does not confer the authority now asserted by the Commission.

C. The Court of Appeals Erroneously Construed the Scope of the FCC's Regulatory Authority Under the Communications Act

The Court of Appeals brushed aside as immaterial both the FCC's interpretation of the Act and the actions of Congress confirming its intention. 555 F.2d at 951-52 (JA 375-78). In so doing, the court ignored established doctrines of statutory construction as well as its own prior decision construing another section of the same Act.

An agency's own interpretation of its statutory authority is entitled to great weight. 1 K. Davis, *Administrative Law Treatise* § 5.06 (1958). This is particularly true when, as here, the agency interpretation includes a contemporaneous construction of the statute by the persons responsible for setting it into operation. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). *Accord, NLRB* v. *Boeing Co.*, 412 U.S. 67, 74-75 (1975); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *FTC* v. *Mandel Brothers*, 359 U.S. 385, 391 (1959).

This Court's recent unanimous decision in *Chemehuevi Tribe* v. *FPC*, 420 U.S. 395 (1975), demonstrates the lower court's total departure from established proper standards of construction. *Chemehuevi* presented the question whether the FPC's statutory licensing power included thermal-electric plants. In concluding that the statute did not include such plants, this Court found that its conclusion was "reinforced by the Commission's consistent interpretation of that authority as not including jurisdiction over ... thermal-electric power plants." 420 U.S. at 408. It further emphasized the "great respect" due an agency's interpretation when it involves "a contemporaneous construction of the Act by the officials charged with the responsibility of setting its machinery in motion." *Id.* at 409-10. The Court also found the interpretation further "enhanced" by the fact that in amending the Act and later reenacting it "Congress gave no indication of its dissatisfaction with the agency's interpretation of the scope of its licensing jurisdiction." *Id.* at 410.

The *Chemehuevi* decision is representative of a long line of cases mandating the same canons of statutory

construction. For example, in *Saxbe* v. *Bustos*, 419 U.S. 65 (1974), the Court found a "longstanding administrative construction" by the Immigration and Naturalization Service "entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched." 419 U.S. at 74. *Accord, e.g., Cammarano* v. *United States*, 358 U.S. 498, 510-11 (1959); *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U.S. 269, 273 (1933).

The Court of Appeals itself has previously followed the same approach with respect to the Communications Act. In *Kay* v. *FCC*, 443 F.2d 638 (D.C. Cir. 1970), a political candidate challenged the FCC's interpretation of the "equal time" requirement of § 315(a) of the Act. The court rejected the candidate's challenge, relying on the facts that the FCC had consistently interpreted the section as excluding such claims and that, on two occasions, Congress had reviewed and amended § 315 without making any change in the Commission's interpretation. The court concluded:

> [A] consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval. [443 F.2d at 646-47.]

The decision in *United States* v. *Wise*, 370 U.S. 405 (1962), relied upon by the court below (555 F.2d at 952 n.41 (JA 378)), is in no way to the contrary. In *Wise*, the Court rejected as "an artificial interpretation of a seemingly clear statute" the argument that a corporate officer is not a "person" within the meaning of § 1 of the Sherman Act. 370 U.S. at 407. In this context, the Court found it unpersuasive that a bill had been introduced, but not passed, that would have amended the definition of "persons" under the Act to include corporate officers. *Id.* at 411. The Court explained that "several equally tenable inferences could be drawn" from the failure to enact the amendment, including the inference that Congress thought the amendment unnecessary because corporate officers were already included. *Id.* The Court also noted that the consistent interpretation by the Department of Justice had been to the contrary and that it had consistently sought and obtained indictments of corporate officers under Section 1 since its enactment. *Id.* at 406-07, 415.

Wise is wholly inapposite to the present case. Here, Congress' decision against expressly limiting the FCC's regulatory authority over newspapers is fully explained in the legislative history and is subject to but one interpretation. Congress made unmistakable that its basis for rejecting the proposed amendments was that it considered them unnecessary: since the Act itself granted no such newspaper regulatory authority, no limiting provision was required. Moreover, Congress found that its view had been confirmed by the FCC's own consistent interpretation and application of the Act and in the FCC's testimony before Congress. Hence, the casual dismissal by the court below of both the clear congressional intention and the FCC's own interpretation flagrantly disregarded the controlling principles of statutory construction. *Chemehuevi Tribe, supra,* 420 U.S. at 408-10.

Having thus dismissed the agency's construction and the actions of Congress, the court below rested its construction of the statute almost entirely on *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). In *Storer*, this Court upheld the FCC's regulations

limiting the number of *broadcast licenses* that would be granted to a single applicant. The regulations, described by this Court as intended "to avoid overconcentration of broadcasting facilities" (351 U.S. at 193), had nothing to do with newspapers or any other nonbroadcasting media. No claim was made that the subject matter of the regulation was outside the sphere of FCC authority under the Communications Act. In short, the basic issue of the FCC's authority to extend its regulatory reach to newspapers, which is at the heart of the present regulations, was not an issue in *Storer*.

Thus, *Storer* cannot provide any support for the present effort by the Commission to extend its authority. Instead, the lower court's blithe assertion that "[i]t requires no extension of *Storer* to conclude the Commission possessed statutory authority" to impose its newspaper ban (555 F.2d at 951 (JA 376)), betrays a patent misunderstanding of the cited case and either a total misunderstanding of the issue presented or an inability to come to grips with that issue.

The court's failure to confront the issue presented is epitomized by its assertion that the ban involves no expansion of FCC authority beyond broadcasting because it "simply imposes qualifications for broadcast licensees." *Id.* at 952 n.41 (JA 378). This statement ignores the fact that the "qualifications" imposed are based solely on participation in newspaper publication, a field over which the Commission has no authority, and are by design and effect a mandate for restructuring the communications media, including the print media, in accordance with FCC values and policies. Broadcast qualifications cannot be used as a means for regulating nonbroadcast fields. As the Court of Appeals

for the Second Circuit observed in invalidating FCC regulations designed to promote competition in the data processing industry:

> The Commission argues that it may properly make regulations which are based upon anti-trust considerations. Again we have no quarrel with the proposition of law. However, the unfair competition, restraint of trade, or potential threat of monopoly, must be in a market in which the Commission has jurisdiction. [*GTE Service Corp.* v. *FCC*, 474 F.2d 724, 733-34 (2d Cir. 1973).]

Similarly, here, the Commission has sought to extend its regulatory reach to promote its view of the public interest in areas over which it has no authority. The Commission's regulations are not "justified by reasons which are properly the concern of that agency." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 116 (1976). They fly in the face of the clear language of the Act, the Commission's own longstanding interpretation, and the express declaration of Congress. They must therefore be set aside as an unauthorized expansion of the FCC's regulatory reach.

II.

THE REGULATIONS VIOLATE THE FIRST AMENDMENT GUARANTEE AGAINST LAWS ABRIDGING FREEDOM OF THE PRESS

An even more fundamental reason for finding the challenged regulations to be beyond the FCC's authority is that they are so plainly beyond the constitutional authority of *any* agency of our government. The FCC regulations, as expanded by the Court of Appeals, constitute a governmental effort to orchestrate the sounds of all major media instruments in this country. By

federal fiat, they impose this policy: those whom the government allows to broadcast, it will also prohibit from publishing daily newspapers in the same community. If it be concluded that Congress authorized the FCC to impose such a policy, then the underlying constitutional issue must be reached: whether Congress itself had the power to grant such an authority.

A. The Government May Not Constitutionally Condition its Grant of a Privilege Upon the Forfeiture of First Amendment Rights

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." The challenged regulations achieve precisely what the Amendment prohibits. They condition the granting of a broadcast license upon a forfeiture of the right to publish a local newspaper; conversely, they penalize the exercise of the right to publish a local newspaper by withholding any opportunity to seek a broadcast license. They do this in the face of this Court's repeated statements that such interference with First Amendment rights is unconstitutional:

> In *Perry* [v. *Sindermann,* 408 U.S. 593, 597 (1972)], the Court broadly rejected the validity of limitations on First Amendment rights as a condition to the receipt of a governmental benefit, stating that the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall,* 357 U.S. 513, 526. Such interference with constitutional rights is impermissible." [*Elrod* v. *Burns,* 427 U.S. 347, 359 (1976) (Opinion of Brennan, J.).]

Accord, Abood v. *Detroit Board of Education,* 431 U.S. 209, 234 (1977); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 605-06 (1967); *Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963).

The Court of Appeals justified the First Amendment infringement on two grounds. It said, first, that since the design of the regulations and the intent of the First Amendment are actually identical—promoting the diversity of available information—the regulations not only do not violate the Amendment, but indeed further its purpose. Second, it held that, in any event, newspapers are not immune from laws of general application which may indirectly burden publication. 555 F.2d at 949, 950-51, 953-54 (JA 369, 374, 381-88). The first contention demonstrates a fundamental misconstruction of the First Amendment; the second relies on a principle which has no application to this case.

B. The First Amendment Does Not Empower the Government to Abridge Freedom of the Press In Order to "Promote Diversity"

Notwithstanding this Court's unequivocal decisions to the contrary, the notion that the First Amendment affirmatively charges government with power to go forth and establish diversity of opinion in the land—enhancing some voices, modulating others, and even silencing a few where need be—still retains currency. It is this wrongheaded notion which underlies the Court of Appeals' decision:

> Since denying access to the airwaves to some involves a substantial though at this time necessary,

restriction of speech, it follows that the Commission acts properly when it attempts to promote diversity by allocating stations to those without control over an alternative major media voice.

* * *

One way to attempt to equalize debate is by boosting the power of the weaker voice; another way is by reducing the power of the dominant one.

* * *

The First Amendment seeks to further the "search for truth." Surely that search will be facilitated by government policy that encourages the maximum number of searchers.

* * *

In fact, the very claim of constitutional abridgement is ironic. First of all, the [regulations are] an attempt to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech. [555 F.2d at 949, 950 n.32, 950-51, 954 (JA 368-69, 372, 374, 388).]

These ideas are a perversion of the First Amendment, and they have been categorically rejected by this Court.

The first significant governmental effort to promote First Amendment "values" by abridging the press came in *Mills* v. *Alabama*, 384 U.S. 214 (1966). In order to ensure a balanced presentation to the voters and to prevent the dissemination of opinions that could not be timely and adequately answered by opposing viewpoints, the Alabama legislature prohibited newspapers from publishing editorials on election day. The Alabama Supreme Court upheld the regulation, finding it to be a "reasonable restriction" upon the press, particularly in light of its "salutary" purpose. 384 U.S. at 219. This Court reversed, declaring that no test of

reasonableness could save the law, that it violated the First Amendment, and that: "It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." *Id.*

The *Mills* decision went unheeded. In 1972, the State of Florida attempted to enforce a "right of reply" statute requiring newspapers to print the response of any candidate whose character or public record they assailed. Before this Court, the statute's proponents sought to justify it on the precise ground forming the linchpin of the Court of Appeals' decision in this case: "that government has an obligation to ensure that a wide variety of views reach the public." *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247-48 (1974).

In holding the statute unconstitutional, this Court set out in some detail the beneficent rationale of the statute as advanced by its advocates: that, although easy access to the marketplace of ideas may have existed when the First Amendment was adopted, it is no longer so; that the past half century has seen a communications revolution in which the power to inform the American people and shape public opinion has become concentrated in the hands of a few; that newspaper chains and one-newspaper towns where the same interests own a radio or television station are representative components of this concentration; and that the public's First Amendment interest in being informed has been jeopardized by such media concentration. 418 U.S. at 248-51.

The proposed method for restoring this First Amendment interest was to require that newspapers, like broadcasters, become "surrogates for the public" and provide a forum for views conflicting with the pub-

lisher's own. The proponents of enforced access found authority for their proposal in *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), wherein the Court rejected the argument that the First Amendment immunizes the press from antitrust laws, and in *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964), wherein the Court spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Based on these cases—the same ones relied upon by the court below—it was argued that government was authorized to establish and regulate the "wide-open" debate envisioned by the First Amendment. 418 U.S. at 251-52.

These arguments were rejected by the *Tornillo* Court for the same reason they should have been rejected by the Court of Appeals in this case:

> However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment . . . . [*Id.* at 254 (footnotes omitted).]

The point is simply that the First Amendment commands government to stay out of the marketplace of ideas, "regardless of how beneficent-sounding" its purposes for managing that marketplace may be. *Id.* at 259 (White, J. concurring).

Last year, this Court had occasion to make this point again in the strongest possible terms. Congress, in an effort to regulate the relative strengths of voices raised during election debates, placed a dollar limitation on

campaign advocacy. The Court's condemnation of such legislation was unreserved:

> It is argued . . . that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . . [*Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976).]

In *Buckley* the Court furthermore put to rest any idea that the government's regulatory powers over broadcasting may be extended to inhibit "traditional" First Amendment activities:

> Neither the voting rights cases nor the Court's decision upholding the Federal Communications Commission's fairness doctrine lends support to appellees' position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society.
>
> . . . .
>
> In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the Court upheld the political-editorial and personal-attack portions of the Federal Communications Commission's fairness doctrine. That doctrine requires broadcast licensees to devote programming time to the discussion of controversial issues of public importance and to present both sides of such issues. *Red Lion* "makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case," by demonstrating that " 'it is idle to posit an unabridgeable First Amendment right to broad-

> cast comparable to the right of every individual to speak, write, or publish.'" *Columbia Broadcasting* v. *Democratic Comm.*, 412 U.S. 94, 101 (1973), quoting *Red Lion Broadcasting Co., supra*, at 388. *Red Lion* therefore undercuts appellees' claim that § 608(e)(1)'s limitations may permissibly restrict the First Amendment rights of individuals in this "traditional free speech case." [424 U.S. at 49-50 n.55.]

The regulations struck down in *Mills, Tornillo,* and *Buckley* pale in comparison with the sweep of the regulations presented in this case. *Mills* inhibited newspaper publishers only on election day; *Buckley* limited protected activities only during an election year; and *Tornillo* burdened the free press only to the extent of having to print certain candidates' replies. But here, the government has taken upon itself to restrain broadcasters from *ever* publishing a local newspaper and to *permanently* bar local newspaper publishers from consideration for broadcast licenses.

Ironically, if the FCC regulations had taken a more limited approach toward promoting diversity, their unconstitutionality would perhaps have been more readily apparent. For example, if the FCC promulgated a regulation denying broadcast licenses to all local publishers who refuse to adopt a right-of-reply policy in their newspapers, surely the court would not have hesitated to strike it down. Yet, since the regulations here have gone considerably further—since they have categorically refused licenses to those same publishers on the ground that they chose to publish at all—the court has lent them unqualified approval. This is a frightening example of "the dangers that beset us when we lose sight of the First Amendment itself, and

> march forth in blind pursuit of its 'values.'" *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 145 (1973) (Stewart, J., concurring).

C. The Regulations Have Not Been Narrowly Drawn to Protect Any Legitimate Governmental Objective

The Court of Appeals' only support for the constitutionality of the regulation—other than the improper notion that the First Amendment authorizes restrictions on the press to promote diversity—was the principle that newspapers are not immune from laws of general application that only indirectly affect publication. There is no dispute that newspapers are subject to an evenhanded application of the Sherman Act [12] or the Fair Labor Standards Act," [13] to "nondiscriminatory forms of general taxation," [14] and to other "regulation of . . . business or financial practices which do not involve First Amendment rights."[15] The Court of Appeals held that this principle validated a government ban on newspaper publication by broadcasters, saying:

> Of course, in serving the public interest the ban may indirectly affect the economics of publication, but the First Amendment does not provide a shield against this. *Associated Press*, 326 U.S. at 20, 65 S.Ct. 1416. [555 F.2d at 954 (JA 387).]

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[12] *Associated Press* v. *United States*, 326 U.S. 1 (1945).

[13] *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192-93 (1946).

[14] *Branzburg* v. *Hayes*, 408 U.S. 665, 683-84 (1972), *citing Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

[15] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 155 (1973) (Douglas, J., concurring in the judgment).

As an attempted validation of these regulations, this is an astonishing statement. It distorts the design and effect of the ban, it wholly misconstrues the holding of the *Associated Press* case, and it finishes by upending the First Amendment.

These regulations do not "indirectly affect the economics of publication." They directly and purposefully prohibit local publication altogether by every broadcaster, irrespective of whether the publication would transgress any legitimate governmental objective unrelated to speech itself. Moreover, the enforcement of these regulations is not the mere "application of general laws"[16] to newspapers, which characterizes *Associated Press* and its progeny; rather, they are directed deliberately and exclusively at newspapers alone, and are calculated to achieve precisely what *Associated Press* forbade: a restraint upon newspapers' expression solely because they are newspapers. *See Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 193 (1946). They penalize newspapers, not *despite* the fact that they express ideas and viewpoints, but precisely *because* they do. Such regulations are patently unconstitutional. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).

Nor can the regulations be defended on the ground that the FCC may consider antitrust policies in exercising its licensing powers. This Court has stated that such policies may properly be considered in determining whether a broadcaster's activities meet the statutory "public interest, convenience, and necessity" standards, and that

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[16] *Associated Press* v. *NLRB*, 301 U.S. 103, 132-33 (1967), *quoted in Branzburg* v. *Hayes*, 408 U.S. 665, 683 (1972).

> in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication. [*United States* v. *Radio Corp. of America*, 358 U.S. 334, 351-52 (1958).]

The present regulations, however, go far beyond any application of "antitrust considerations." They indiscriminately bar all newspaper-broadcast affiliations, without regard to whether any actual competitive harm —much less the kind of monopoly situation described in the *Radio Corporation* case—is present.

There was no effort whatever to achieve in these FCC regulations the precision which the Constitution requires. No attempt was made to restrict the ban to those whose media activities are monopolistic, anticompetitive, or in any way an abuse of the license privilege. They thus threaten to broadly stifle or penalize newspaper publication without achieving any legitimate governmental objective.

The FCC and the Court of Appeals actually recognized this to be so. In its Report, the Commission stated flatly that its regulations were "not in the least premised on improprieties in the operation of media holdings." 50 F.C.C.2d at 6085 (JA 211). It found that there was no claim, far less the requisite constitutional showing, that any broadcaster affiliated with a local newspaper had committed any noncompetitive acts. *Id.* at 1072 (JA 186). In rejecting the Department of Justice's unsupported divestiture arguments, the Commission observed that "merely stating that all daily news-

paper-VHF television combinations are inconsistent with the public interest and the anti-trust laws is not enough." *Id.* at 1080 n.29 (JA 201). Likewise, the Court of Appeals stated that the record assembled in the five-year proceeding to support the ban was "inconclusive," that its hoped-for benefits were "speculative," and that, at bottom, it was premised "primarily on policy, not factual considerations." 555 F.2d at 962, 965, 957 (JA 414, 427, 396).

Rules treading on First Amendment rights must be premised on sturdier bases. "[W]e again confirm the principle that when a State . . . burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant State policy requires more than a bare assertion, based on a conceded absence of supporting evidence, that the burden is connected to such a policy." *Carey* v. *Population Services International,* 97 S.Ct. 2010, 2022-23 (1977).

These regulations, if defended on the ground of "antitrust considerations," thus cannot even begin to survive the "exacting scrutiny" which must be given to any rules limiting the exercise of First Amendment rights. *Elrod* v. *Burns, supra,* 427 U.S. at 362; *Buckley* v. *Valeo, supra,* 424 U.S. at 44-45, 64-65.

> [E]ncroachment "cannot be justified upon a mere showing of some legitimate state interest." *Kusper* v. *Pontikes,* 414 U.S. at 58. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. . . . Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, and the Government must "emplo[y] means closely drawn to avoid unnecessary abridgement . . . ." *Buckley* v. *Valeo, supra,* 424 U.S. at 265. "[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper* v. *Pontikes, supra,* at 59. [*Elrod* v. *Burns, supra,* 427 U.S. at 362-63 (additional citations and footnote omitted).]

Accord, Wooley v. *Maynard,* 430 U.S. 705, 716-17 (1977).

In sum, the FCC and the Court of Appeals have wholly misperceived the government's legitimate role in promoting diversity in the media. "The Commission has a duty to encourage a multitude of voices but only in a limited way, *viz.,* by preventing monopolistic practices and by promoting technological developments that will open up new channels." *Columbia Broadcasting System, supra,* 412 U.S. at 157-58 (Douglas, J., concurring in the judgment). Further than this the Constitution will not allow the government to go:

> Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that "fairness" was far too fragile to be left for a Government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice. [*Columbia Broadcasting System, supra,* 412 U.S. at 145-46 (Stewart, J., concurring).]

This case requires the Court to confirm that choice again.

III.

THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE FCC IN ORDERING THE FCC TO ADOPT A RETROACTIVE RULE REQUIRING UNIVERSAL DIVESTITURE

If this Court should conclude that the FCC has both the statutory and constitutional authority to adopt regulations barring newspaper-broadcaster affiliation, then the question of the Court of Appeals' expansion of those regulations must be considered. The Court of Appeals held that it was irrational for the FCC to adopt a prospective rule without also adopting a retroactive rule compelling divestitures by all existing locally-affiliated broadcast stations and newspapers. As will be demonstrated herein, the court grossly exceeded its legitimate judicial review function in ordering the FCC to expand its regulations.

In reviewing the FCC's exercise of its rulemaking power, the Court of Appeals first declared that the administrative record "no more establishes that cross-ownership serves the public interest than injures it. After years of study, the record was essentially inconclusive." 555 F.2d at 962 (footnote omitted) (JA 413-14). It then hypothesized that "[h]ad the Commission reasoned that because diversified ownership is prima facie in the public interest, local cross-ownership violates the public interest, it would have been rational for it to conclude that divestiture was generally called for . . . ." *Id.* (JA 414). According to the court, the Commission might have supported the adoption of such a presumption by referring to (1) its statutory obligation to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g); (2)

"the policies of the First Amendment"; and (3) the Commission's own "long-standing policy . . . that diversification of media sources is of central importance." *Id.* at 962-63 (JA 417-18).

Although the court found that such an approach would have been rational, it recognized that "[t]he Commission did not do this, however." *Id.* at 963 (JA 418). Instead, the Commission elected to grandfather all but a few cross-ownership situations because it found the record inconclusive—if not barren—regarding any public benefit flowing from divestiture, while also finding specific evidence of direct public harm that might result from broadscale divestitures.

But the court found itself unpersuaded by the Commission's decision to grandfather. The court's own judgment was that the three areas of public harm pinpointed by the Commission—loss of local ownership and mangement, loss of continuity in operation and programming, and economic dislocations—were not of sufficient weight to overcome the court's own preference for the presumption approach. *Id.* at 963-65 (JA 419-26). From this judgment the court leaped without further analysis to the conclusion that its presumption idea was not merely *one* rational standard, but rather the *only* rational standard. It declared any other standard to be *irrational*. *Id.* at 965 (JA 426).

Finally, having established its own presumption theory as the controlling criterion, the court then searched the record for evidence affirmatively establishing that cross-ownership was of public benefit. Finding none sufficiently persuasive, the court declared that the FCC was compelled to order divestiture. *Id.* at 965-66 (JA 426-31).

It is axiomatic that in reviewing agency actions, "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971). The court's function is to correct errors of law and to ensure that the agency action is rational. 5 U.S.C. § 706 (1970). Beyond that, it is not for the court to supplant the agency's determination "with one more nearly to its liking." *Permian Basin Area Rate Cases,* 390 U.S. 747, 792 (1968).

As will be shown below, the Court of Appeals' treatment of the FCC's rulemaking decision repeatedly violated these cardinal principles governing judicial review of administrative actions. Specifically, the court exceeded its proper function in three major respects:

(a) It overrode the FCC's exercise of its discretion to distinguish between retroactive and prospective application in its rulemaking;

(b) It usurped the FCC's policymaking function by creating a new rule of law under the guise of a "presumption";

(c) It substituted its own evaluation of the factors considered by the FCC in assessing the public interest by mandating the elevation of "diversity" to supremacy over all other interests.

Each of these errors is discussed below.

A. The FCC's Exercise of Its Discretion to Distinguish Between Retroactive and Prospective Rulemaking Was Not Irrational

Because of the unfairness inherent in the application of new rules to past conduct, retroactive administrative rulemaking is disfavored. 1 K. Davis, *Administrative Law Treatise,* § 5.08 at 340-41 (1958). Rather, agencies have been admonished to prefer prospective rulemaking in carrying out their quasi-legislative functions. *SEC* v. *Chenery Corp.,* 332 U.S. 194, 202 (1947). This is particularly true where, as here, the new rule departs from the agency's long established prior practice. *Retail, Wholesale & Department Store Union* v. *NLRB,* 466 F.2d 380, 388-90 (D.C. Cir. 1972); *NLRB* v. *Majestic Weaving Co.,* 355 F.2d 854, 860-61 (2d Cir. 1966).

Consistent with this fundamental preference for prospective-only rule changes, agencies and legislatures alike frequently accompany the adoption of new regulations with a "grandfather" provision. Such provisions permit rulemakers the flexibility to phase in a new policy without dismantling the built-up expectancies and reliance interests of those who have conducted themselves in accordance with a previous policy. The provisions are an indispensable regulatory tool where the rulemakers judge, on balance, that their policy change can best be effectuated gradually, rather than being attended with the disruption, inequities, and other mischief of a wholesale, abrupt departure from past policy.

Because such grandfathering is often the fairest and most reasonable approach to policy shifts, it is a practice which appears in virtually every regulatory context, and which has received unanimous, unqualified judicial endorsement.[17] Significantly, grandfathering

[17] *E.g., City of New Orleans* v. *Dukes,* 427 U.S. 297, 304-05 (1976) (city ordinance prohibiting street vendors grandfathered vendors in operation for eight years); *United States* v. *Citizens &*

is a common FCC approach to that agency's adoption

S. Nat'l Bank, 422 U.S. 86 (1975) (amendments to Bank Holding Company Act grandfathered certain transactions which stood unchallenged as of July 1, 1966); *USV Pharmaceutical Corp.* v. *Weinberger*, 412 U.S. 655, 658 (1973) (amendments to Federal Food, Drug, and Cosmetic Act added new drug efficacy requirements, but grandfathered all drugs then being commercially sold and not classified as "new drugs" under original Act); *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6-7 (1970) (revocation of federal tax exemption for certain category of nonprofit corporations included grandfathering of existing corporations); *First Nat'l Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 258 (1966) (National Bank Act prohibited certain category of branch banks, but grandfathered existing branches); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944) (amendment to Natural Gas Act required certificate of convenience and necessity for gas sale, but grandfathered existing operations); *United States* v. *Maher*, 307 U.S. 148, 153 (1939) (Motor Carrier Act required carriers to obtain permit or license, but grandfathered existing carriers); *Stanley* v. *Public Util. Comm'n*, 295 U.S. 76, 78 (1935) (state law required common carriers to obtain certificate of convenience and necessity, but grandfathered existing carriers); *Sampere* v. *City of New Orleans*, 166 La. 776, 117 So. 827 (1928), *aff'd per curiam*, 279 U.S. 812 (1929) (city zoning ordinance prohibiting business establishments in certain area grandfathered existing businesses); *Watson* v. *Maryland*, 218 U.S. 173, 176-77 (1910) (state law requiring physicians to be licensed grandfathered physicians previously in practice); *Mobil Alas. Pipeline Co.* v. *United States*, 557 F.2d 775, 781 (5th Cir. 1977) (Interstate Commerce Act authorized ICC to suspend new carrier rates, but grandfathered certain initial rates); *Johnson* v. *Mathews*, 539 F.2d 1111, 1114-15 (8th Cir. 1976) (establishment of federal eligibility criteria for disability income maintenance program grandfathered those already eligible under similar state programs); *Natural Resources Defense Council, Inc.* v. *EPA*, 529 F.2d 755, 759-60 (5th Cir. 1976) (EPA Clean Air Act regulations revised criteria for state implementation program, but grandfathered certain nonqualifying practices); *Iowa Indep. Bankers* v. *The Board of Governors of the Fed. Reserve Sys.*, 511 F.2d 1288, 1294-95 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 875 (1975) (state statute prohibited acquisition of state banks by out-of-state bank holding companies, but grandfathered existing out-of-state companies); *Poynter* v. *Drevdahl*, 359 F. Supp. 1137, 1143-44 (W.D. Mich. 1972) (university regulation prohibited non-dormitory residence by single students, but grandfathered existing non-dormitory residence).

of new standards."[18] Even more importantly, it is a practice that has been followed with regularity by the FCC in the precise area now before this Court—regulations designed to promote diversity through limitations on multiple ownership."[19] As the FCC expressly recognized in its decision in this case: "[T]he [proposed] idea of divestiture of ownership was a departure from the typical Commission approach of limiting any new rules to prospective effect." 50 F.C.C.2d at 1047 (JA 137).

The courts, in reviewing the FCC's regulations in the past, have recognized and endorsed the FCC's judgment that it should seek to avoid the disruption and unfairness of divestitures required by retroactive ap-

[18] *E.g.*, *FM Broadcast Rules*, 40 F.C.C. 720 (1962) (existing FM stations with non-conforming power grandfathered); *Daytime Skywave Transmission Rules*, 18 P&F Radio Reg. 1845 (1959) (existing station interference grandfathered); *CATV Rules*, 2 F.C.C.2d 725 (1966) and 36 F.C.C.2d 143 (1972) (existing CATV signals grandfathered); *Telephone Terminal Equipment Rules*, 59 F.C.C.2d 83 (1976) (existing terminal equipment grandfathered under registration program).

[19] *E.g.*, *Multiple Ownership Rules* (Docket No. 14711), 45 F.C.C. 1476 (1964) (stricter prohibitions on common ownership of overlapping stations in same service (AM, FM or TV); existing ownerships grandfathered); *Multiple Ownership Rules* (Docket No. 18110), 22 F.C.C.2d 306 (1970) (so-called "one-to-a-market" restriction on station ownership; existing ownerships grandfathered); *Multiple Ownership Rules* (Docket No. 8967), 18 F.C.C. 288 (1953) (numerical limitation on multiple ownership of stations established a level to avoid "unduly disruptive" extensive divestiture); *Report on Chain Broadcasting* (Order 37, Docket No. 5060) (1941) (limitation on network ownership of stations established at level to avoid "unduly disruptive" extensive divestiture).

plication. For example, in upholding the Commission's Chain Broadcasting Regulations in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 207 (1943), this Court noted that the FCC had decided not to require the universal divestiture of all existing network-owned stations. Instead, "since substantial business interests ha[d] been formed on the basis of the Commission's continued tolerance of the situation, it was found inadvisable to take such a drastic step." *Id.* Similarly, in *Storer Broadcasting Co.* v. *United States*, 240 F.2d 55, 56 n.3 (D.C. Cir. 1957), the court upheld the FCC's Multiple Ownership rules, noting specifically that the numerical limitations on AM and FM ownership were based on the FCC's "experience, coupled with a design to avoid undue disruption of existing station ownership." Likewise, in *Buckeye Cablevision, Inc.* v. *FCC*, 387 F.2d 220 (D.C. Cir. 1967), the court once again endorsed the FCC's decision to limit new requirements to prospective application, stating:

> We think the "grandfather rights" manifested the Commission's "felt need for regulating * * * [CATV], while at the same time * * * satisfied the dictates of fairness by affording sanction for enterprises theretofore established." [387 F.2d at 228, *quoting United States* v. *Maher*, 307 U.S. 148, 153 (1939).]

Most recently, in *Teleprompter Cable Communications Corp.* v. *FCC*, No. 75-1563 (D.C. Cir. Sept. 19, 1977), the same court considered the FCC's 1972 cable television rules which had applied prospectively only the agency's new standards regarding importation of distant signals. The court found "unwarranted and arbitrary" the FCC's failure to grant a certificate of compliance pursuant to the grandfather provision. Slip op. at 11.

These decisions reflect our deeply-felt aversion to retroactive lawmaking. They furthermore explain the long-held principle that statutes and regulations are presumed to operate prospectively "in the absence of clear expression to the contrary." *Hassett* v. *Welch*, 303 U.S. 303, 314 (1938); *Miller* v. *United States*, 294 U.S. 435, 439 (1935). Finally, they are consistent with this Court's express directive to federal administrative agencies to prefer prospective rulemaking in carrying out their regulatory responsibilities:

> The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. [*SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).]

Moreover, the general directive of *Chenery* is particularly apposite to the FCC's regulations in light of the recognized "legitimate renewal expectancies implicit in the structure of the [Communications] Act." *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). *Accord, Alianza Federal de Mercedes* v. *FCC*, 539 F.2d 732, 736 n.9 (D.C. Cir. 1976). While a broadcaster has no vested property right to his station license, the reasonable expectancy of renewal for a licensee who has performed in the public interest is integral to the licensing system. It provides licensees the incentives both to strive for a high standard of broadcast performance and to make the investment necessary to achieve that standard. Thus, the court below has in the past recognized that "the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service." *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1213 n.35 (D.C. Cir. 1971).

Here, the FCC acted in accordance with our legal system's fundamental preference for prospective rulemaking. It complied with this Court's specific directive to administrative agencies to prefer such rulemaking. *SEC* v. *Chenery Corp., supra.* And it acted in a manner consistent with its own prior practice and with the legitimate renewal expectancies of meritorious licensees under the Communications Act. Thus, by deciding against broad divestiture, the FCC "responded to the felt need for regulating . . . through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established." *United States.* v. *Mahler,* 307 U.S. 148, 153 (1939). *Accord, City of New Orleans* v. *Dukes, supra,* 427 U.S. at 304-05; *United States* v. *Maryland Savings-Share Insurance Corp., supra,* 400 U.S. at 6-7. The Court of Appeals' decision that it was "irrational" for the FCC to do so cannot be sustained.

B. The Court of Appeals Usurped the FCC's Policymaking Function by Creating a New Rule of Law Under the Guise of a "Presumption"

The basic issue before the Commission in its rulemaking proceeding was whether existing broadcast licensees affiliated with local newspapers serve the "public interest," or whether the public interest demands the breakup of all such combinations through forced divestitures. After an extended proceeding in which proponents of all viewpoints were given the opportunity to make showings supporting or opposing the proposed rule, the Commission concluded that the case had not been made to support the position that sweeping divestitures would be in the public interest.

The Court of Appeals did not disagree with the FCC's evaluation of the record. Rather, the court found that "the record was essentially inconclusive." 555 F.2d at 962 (JA 413-14). However, undeterred by the absence of support in the record for a divestiture order, the Court ruled that the Commission was obliged to create a "presumption"—that "cross-owned stations do not serve the public interest" (*Id.* at 963 (JA 417)) —and to order divestitures on the basis of that "presumption." *Id.* at 966 (JA 431). In other words, the court ordered the Commission to presume the answer to the very question being addressed in the rulemaking proceeding, and to promulgate a divestiture rule based upon this presumption rather than upon the record and the Commission's expertise.

In simplest terms, the Court of Appeals held that the FCC erred by requiring record support before adopting the proposed rule. According to the court, the FCC should have assumed the existence of a problem, though the "inconclusive" record failed to support it (*Id.* at 962 (JA 414)), and should have adopted a drastic remedy, though any benefit admittedly was "speculative" (*Id.* at 965 (JA 427)). Had the agency in fact acted in this manner, its action would have been a classic example of agency abuse.

It is a basic principle of administrative decisionmaking that "the proponent of a rule or order has the burden of proof." Administrative Procedure Act § 7(c), 5 U.S.C. § 556(d) (1970). It is equally basic that a showing of a problem is a necessary predicate for adoption of a regulation to remedy the problem. "A regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if the problem does not exist." *City of Chicago* v. *FPC,* 458

F.2d 731, 742 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

The burden to document the need for a proposed rule has particular force here since its effects necessarily carried a threat of great and irreparable harm to the public interest; that is, it would either force licensees to cease publication of their local newspapers, or it would force the licensees to cease broadcast services in their communities even though their licenses had been granted and repeatedly renewed over a period of many years, each time upon an FCC finding that the "public interest, convenience and necessity" was thereby served. Indeed, many of the existing licenses were obtained as a result of the FCC's own policy for many years of encouraging newspaper publishers to enter broadcasting. If that policy was to be reversed and hundreds of licenses suddenly found to be contrary to the public interest, a persuasive showing supporting such a result was surely not an irrational agency requirement. "Divestiture has a substantial impact, and should be required only when we can determine that it is required by the public interest." 50 F.C.C.2d at 1080 n.29 (JA 201).

Here, the record failed altogether to support the proposed rule. The record showed, for example, that there was one significant difference between the performance of newspaper-affiliated broadcasters and other broadcasters: the newspaper-affiliated broadcasters have a demonstrated record of "statistically significant superiority" in the important area of local news and public affairs programming.[20] Nowhere in the record was a claim made that any newspaper-affiliated stations

[20] This conclusion was documented by the FCC's own staff study. 50 F.C.C.2d at 1078 n.26 and App. C (JA 198 and 230-41).

had engaged in anticompetitive acts. 50 F.C.C.2d at 1072 (JA 186). To the contrary, the record showed a long history of public service in connection with a number of such stations. 50 F.C.C.2d at 1078 (JA 198).

In terms of diversity, nothing in the record suggested that the affiliation between a newspaper and a broadcast station meant that the two reflected the same viewpoint. Indeed, the record showed that the two typically have entirely separate and independent reporting and editorial staffs, management and policies. *Id.* at 1059-60, 1089 (JA 161-62, 219-20). "Were it otherwise and the two operated jointly," said the Commission, "it might have been necessary . . . to require divestiture in many more situations." *Id.* at 1089 (JA 219). The record furthermore showed an established "pattern of a continuing separation" of newspaper-television affiliation as a result of normal market forces. *Id.* at 1061, 1080 n.29 (JA 164, 202).[21] Relying on this pattern, and taking account of the further reduction of newspaper-affiliated stations that would result from its prospective ban, the Commission concluded that wholesale divestiture was not required. *Id.* (JA 201-02).

The proponents of sweeping divestiture simply failed to support their rhetoric and suppositions with facts. The Department of Justice, for example, was an active participant, but could offer only "general observations" regarding media competition "rather than submit data upon which industry-wide divestiture could be based." *Id.* (JA 201). The FCC was constrained to observe with respect to the Department's unsupported

[21] The evidence in the record showed that the percentage of television stations that are affiliated with newspapers had declined from 48% in 1948, to 14% in 1969, and to less than 11% in 1974. 50 F.C.C.2d at 1061, 1080 n.29 (JA 164).

assertions that "merely stating that all daily newspaper-VHF television combinations are inconsistent with the public interest and the anti-trust laws is not enough." *Id.* (JA 201).

The Court of Appeals, however, avoided the fact that there was no *showing* that existing affiliated local newspapers and broadcast stations are contrary to the public interest by the simple expedient of *presuming* that they are. The bases asserted by the court to support its "presumption" are entirely circular. Whether either the broad statutory standard of encouraging "larger and more effective use of radio," or First Amendment policies, or FCC policies favoring diversity would in fact be substantially advanced by divestiture was the very question presented in the proceeding.[21] To presume that divestiture would further these policies and serve the public interest is to engage in the ultimate in question-begging.

But the court not only ruled that the Commission could have engaged in such a process, it held that the Commission was "compelled" to resolve the rulemaking proceeding in that manner. 555 F.2d at 966 (JA 431). The court was thus using the presumption as

[21] In its Further Notice of Proposed Rulemaking, which initiated this proceeding, the FCC noted that it had "insufficient information" and "substantial concern about the possible effects" of divestiture. 22 F.C.C.2d at 340, 348 (JA 103, 119). The Commission thus stated the purpose of the proceeding: "[C]omments filed in this proceeding to date have led us to the view that it might be in the public interest to fashion rules embracing divestiture and newspaper ownership, and we seek through the vehicle of this further notice to make a careful examination of the matter." 22 F.C.C.2d at 340 (JA 103-04). Nevertheless, the Court of Appeals criticized the Commission for "never explain[ing] that or why it had abandoned the presumption suggested in the notice of proposed rulemaking." 555 F.2d at 963 (JA 919).

would a legislative body, creating the kind of controlling legal presumption that is a transparent technique for "concealing by fiction a change in the substantive law." *See* F. James, *Civil Procedure* § 7.9 at 259-60 (1965). Whatever the propriety of such a presumption if created by Congress or if developed by the FCC, the Court of Appeals clearly has no authority to engage in such a legislative function.

The impropriety of the court's decision in this respect is exemplified by the squarely contrary decision by the same court only three weeks later in *Home Box Office, Inc.* v. *FCC*, No. 75-1280 (D.C. Cir. Mar. 25, 1977), *cert. denied*, 46 U.S.L.W. 3190 (U.S. Oct. 3, 1977). In *Home Box Office*, the court noted the absence in the record of "factual data . . . which would allow [the FCC] to assess the likely effect of its rules on various fields of competition." Slip op. at 64. Instead, said the court, arguments in this regard advanced by the Department of Justice were "basically speculative" and were "premised on the unverified assumption that enhancement of competition—actual or potential—is always a good." *Id.* at 65. The court then pointedly warned: "Serious questions would be raised if the Commission sought to justify its rules solely on the basis of such a presumption." *Id.* at 65 n.73.

The Court of Appeals here, however, held that the FCC was *compelled* to rest its decision on precisely such an "unverified assumption" or "presumption." 555 F.2d at 966 (JA 431). The "presumption" it created was a patent device for ordering the FCC to regulate in a manner more to the liking of the Court of Appeals, without regard either to the record before the agency or to the FCC's judgment as to where the public interest lay.

C. The Court of Appeals Improperly Substituted Its Own Evaluation of the Factors Considered by the FCC in Assessing the Public Interest

As discussed above, *supra* at 40-46, the preference for prospective rulemaking is deeply imbedded in our legal system and reflects both a sensitivity toward those who have established their operations under existing legal standards and a desire to implement policy shifts without undue disruption. That preference was itself sufficient reason for the FCC to decide not to order universal divestiture by hundreds of existing broadcast licensees whom the Commission, through its license renewal practice, had consistently found to be serving the public interest.

However, the Commission's judgment was actually premised on a good deal more. Its decision was also soundly based on specifically identified countervailing considerations which, in its opinion, outweighed any speculative benefits that could be claimed for divestitures. The Commission concluded that the proposed regulations gave "too little weight to the consequences" of universal divestiture (50 F.C.C.2d at 1078 (JA 197)), and explained:

> Having said that our primary concern is diversity in programing service, we have analyzed the question of requiring full-scale divestiture under standards and with regard for considerations which are relevant under our broad public interest mandate. This does not mean that the Justice Department's concern for economic competition is irrelevant; only that it is of secondary concern under the Commission's regulatory responsibilities. After reviewing the record in this context, we believe that because of the disruption and losses which could be expected to attend divesti-

> ture—resulting in losses or diminution of service to the public—divestiture should be limited to use in only the most egregious cases. [*Id.* at 1080 (JA 200-02) (footnotes omitted).]

The Court of Appeals, again acting as if Congress had empowered it, rather than the FCC, to implement the Communications Act, simply disagreed with the Commission's judgment and sought to substitute its own.

Thus, for example, the FCC was concerned about the effect on the quality of broadcast service that would result from wholesale displacement of existing broadcast station owners. This concern was based on the agency's extensive experience in observing and evaluating the effect on broadcast service of continuity of ownership and management. For example, in recognition of the public interest benefits of continuity, it has in the past established rules dealing with license transfers and "trafficking". 47 C.F.R. § 1.597 (1976). In so doing, it has specifically relied upon "the benefits which we believe, based on our experience, come from sustained ownership." ***Procedures on Transfer & Assignment Applications,*** 32 F.C.C. 689, 690 (1962). Its judgment in the present proceeding, again relying on its accumulated experience and expertise, was that the loss of continuity would adversely affect broadcast services. 50 F.C.C.2d at 1078, 1080 & n.29 (JA 197-98, 200-02). The disruption in continuity of service would mean, the FCC found, that "the new owner would lack the long knowledge of the community and would have to begin raw." Id. at 1078 (JA 197).

The court, however, dismissed this whole area of consideration as having "scant force in this case," reasoning that "[a] one-time alteration in the owner-

ship structure of the broadcast industry should not effect [sic] the public's interest in quality programming because the new owners will become the beneficiaries of any unofficial policy of continuity." 555 F.2d at 964 (JA 422). Thus, incredibly, the court dismissed the agency's concern regarding drastic and abrupt disruptions of service because, after the disruption had taken place, "continuity" could begin anew.

The court similarly dismissed in summary fashion the FCC's concern that disruption would be especially harmful because so many of the sales under a broad divestiture order would be to non-local interests. 50 F.C.C.2d at 1078 (JA 197). The court simply eliminated this factor with the statement that "even if transfer to non-local owners entails extraordinary disruption, there is no basis for assuming that such transfers will result from divestiture." 555 F.2d at 964 (JA 423). The court's statement erroneously ignored the record, which included an extensive and detailed study that analyzed the economic impact of widespread divestiture and concluded that purchasers of many divested stations would be multiple owners and nationwide conglomerates. 50 F.C.C.2d at 1063 (JA 167). The statement also ignored the fact that a ban on local station ownership imposed simultaneously on a large number of broadcasters would by its very nature almost inevitably lead to widespread trading by local owners for distant stations. *Id.* at 1068-69 (JA 178-79).

The Commission thus based its decision not only on considerations of fundamental fairness, but also on its recognition that widespread divestiture, a "severe

remedy" which it has always used sparingly, carried with it harm to the public interest. Had the record been persuasive in showing actual harm from current licensees' newspaper affiliations, the Commission might have decided differently. But nothing compelled it to impose such a drastic remedy, even though the Court of Appeals might have found a different result more in keeping with its own predisposition on the policy questions presented.

Even where a problem is shown to exist—which it was not here—an agency has broad discretion in selecting from among various solutions and remedies. Here the regulations adopted by the Commission implemented a multi-faceted approach to newspaper-broadcaster affiliation. The regulations provided that (1) no new broadcast license will be granted to a local newspaper publisher; (2) any existing broadcast licensee who acquires or establishes a local newspaper in the future will be required to divest its broadcast license within a year; (3) no transfer of a license by an existing broadcaster will be approved if the transfer also includes sale of an affiliated newspaper to the same person; and (4) forced divestitures will be required within five years by any licensee who owns the only local newspaper and the only local television or radio station. "It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations." *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 225.

A regulation is not invalid because "it might have gone farther than it did," *Roschen* v. *Ward,* 279 U.S. 337, 339 (1929), or because it "take[s] one step at a time," *Williamson* v. *Lee Optical, Inc.,* 348 U.S. 483,

489 (1955). *Accord, Califano* v. *Jobst*, 46 U.S.L.W. 4004, 4007 (U.S. Nov. 8, 1977); *City of New Orleans* v. *Dukes, supra*, 427 U.S. at 304. Whether the Court of Appeals might have struck a different balance is beside the point. As this Court has admonished courts reviewing administrative agency decisions:

> Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. [*Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).]

See also Butz v. *Glover Livestock Commission Co.*, 411 U.S. 182, 185-86 (1973); *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112-13 (1946).

The Court of Appeals here did not merely "slid[e] unconsciously" into the domain of policy. It affirmatively embraced policy decisions at each turn and dictated to the Commission the court's own view of policy for the communications media, without regard to either the record produced before the FCC in its extended proceeding, the FCC's accumulated experience and judgment, or the fundamental limitations on the scope of the court's legitimate review function. In all this, the court grossly misjudged its role.[33]

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[33] Even assuming that the FCC had erred, the Court of Appeals was not empowered to order the Commission to adopt a broader rule. As this Court held in *NLRB* v. *Food Store Employees Local 347*, 417 U.S. 1, 9-10 (1974):

> It is a guiding principle of administrative law, long recognized by this Court, that "an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940) [additional citations omitted]. Thus, when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course.

Accord, NLRB v. *Enterprise Association of Steam Pipefitters Local 638*, 429 U.S. 507, 522, n.9 (1977); *South Prairie Construction Co.* v. *Local 627, Operating Engineers*, 425 U.S. 800, 803-06 (1976); *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-34 (1975); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

By "order[ing] the Commission to take further steps to ensure that everyone would be consistently treated *under the standard already adopted for new license applicants*," 555 F.2d at 970 (emphasis added) (JA 443), the court below violated the cited principle. Its order improperly foreclosed the Commission on remand from further explaining its reasons for rejecting broader divestiture, from obtaining or citing additional evidence in support of its reasons for rejecting broader divestiture, or from choosing to treat all groups alike by rejecting both retroactive and prospective prohibitions on cross-ownership.

In rendering its decision to grandfather most existing newspaper-licensee cross-ownership, the FCC acted within its area of particular expertise, considered all relevant factors, thoroughly reviewed and relied upon the record, and properly articulated a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962). The lower court's criticisms of the Commission's decision, and its ultimate reversal of that decision, are a blatant and classic example of a reviewing court improperly "substitut[ing] its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra*, 401 U.S. at 416.

CONCLUSION

For the reasons stated, NAB respectfully submits that the FCC's regulations exceed its statutory and constitutional authority and that, therefore, the decision of the Court of Appeals upholding their validity should be reversed.

Alternatively, if it is found that the regulations are within the Commission's authority, NAB respectfully submits that the court below exceeded its proper judicial review function in finding that the FCC could not adopt a prospective-only rule and in requiring the FCC to expand its rule to order divestitures. Therefore, the portion of the Court of Appeals' decision vacating the regulations with respect to existing licensees and remanding to the FCC with instructions to order divestitures should be reversed.

Respectfully submitted,

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November 17, 1977

APPENDIX

APPENDIX

The relevant provisions of the Administrative Procedure Act of 1946, as amended, are as follows:

5 U.S.C. § 556(d):

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The relevant provisions of the Communications Act of 1934, as amended, are as follows:

47 U.S.C. § 151:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio . . ., there is created a commission to be known as the "Federal Communications Commission"....

47 U.S.C. § 152(a):

The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided . . . .

47 U.S.C. § 303(g):

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

. . . .

Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the

larger and more effective use of radio in the public interest;

47 U.S.C. § 309(a):

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

FOR ARGUMENT

SUPREME COURT, U.S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

Nos. 76-1595 and 76-1604
(Consolidated with Nos. 76-1471, 76-1521, 76-1624 and 76-1685)

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

AND

UNITED STATES OF AMERICA, AND

RESPONDENTS

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT FEDERAL COMMUNICATIONS COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

AND

UNITED STATES OF AMERICA,

RESPONDENTS

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,

PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION,

UNITED STATES OF AMERICA, AND

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (App. 339) [1] is reported at 555 F. 2d 938. The order granting in part the Commission's

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[1] "App." citations refer to the joint appendix produced by the petitioners in these cases and in four consolidated cases.

motion for stay of mandate (App. 435) is reported at 555 F. 2d 967. The orders of the Commission (App. 134, 317) are reported at 50 FCC 2d 1046 and 53 FCC 2d 589.

JURISDICTION

The court of appeals entered judgment on March 1, 1977 (App. 432). A partial stay of mandate was granted on April 5, 1977 (App. 435). Petitioners National Association of Broadcasters and American Newspaper Publishers Association filed for writs of certiorari on May 13, 1977, and May 16, 1977, respectively, each invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). This Court granted the petitions on October 3, 1977, and consolidated the cases with Nos. 76–1471, 76–1521, 76–1624, and 76–1685.[2]

QUESTION PRESENTED

Whether, consistent with its statutory mandate and the First Amendment, and in light of changed industry conditions, the Federal Communications Commission may adopt rules prohibiting future newspaper-broadcast cross-ownership in the same geographic area, where these rules are based on the Commission's long-standing policy of furthering the diversification of mass media and there has been no showing that promotion of this policy would result in any public interest harm.

STATUTES AND REGULATIONS INVOLVED

The statutes involved are Sections 1, 2(a), 4(i), 4(j), 301, 303, 307, 308, 309 and 326 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 301, 303, 307, 308, 309 and 326, and Section 10(e) of the Administrative Procedure Act, 80 Stat. 381, as amended, 5 U.S.C. § 706. The Communications Act provisions are set forth at App. 27–32. The pertinent regulations of the Federal Communications Commission, 47 C.F.R. §§ 73.35, 73.240 and 73.636, are set forth at App. 243 and 337.

[2] In one of these related cases, No. 76–1471, the Commission appears as a petitioner. Its opening brief in that case has already been filed.

STATEMENT

I. INTRODUCTION AND BACKGROUND

These consolidated cases deal with a 1975 FCC decision amending the Commission's multiple ownership rules [3] to codify, for the first time, standards for licensing of broadcast facilities to owners of daily newspapers serving the same community. These rules prohibit the creation of new co-located newspaper-broadcast combinations,[4] but do not affect existing combinations except where license renewal would perpetuate an effective local media monopoly. In these latter instances, the rules require divestiture of the newspaper or broadcast station.[5]

The Commission's prospective rule, which prohibits the formation of new co-located newspaper-broadcast combinations, was affirmed by the court of appeals. The FCC is a respondent in Nos. 76–1595 and 76–1604, in which the petitioners challenge the affirmance of the prospective rule. We will argue in this brief that the prospective rule should be sustained.

The court of appeals invalidated both the "grandfather" clause which permitted most newspaper owners to maintain their existing affiliation with local broadcast outlets, and the rule which required divestiture where the combination constituted an effective local media monopoly. The court below

[3] *Second Report and Order* (Docket No. 18110), 50 FCC 2d 1046 (App. 134), reaffirmed in all pertinent respects on reconsideration, 53 FCC 2d 589 (App. 317).

[4] The rules do not place a blanket prohibition on a newspaper owner's becoming a broadcast licensee. The rules only operate to bar newspaper-broadcast cross-ownership where the broadcast station and commonly owned newspaper serve the same community. This geographic limitation is operative when a specified signal contour of the station encompasses the entire community in which the daily newspaper is published. The parties do not challenge the basis upon which the FCC determined that the newspaper and broadcast station serve the same geographic area. Appendix F, 50 FCC 2d at 1099–1106 (App. 243–263).

[5] See Appendix F, *id.*

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held that the Commission was required to presume that cross-ownership is contrary to the public interest. In the Commission's opening brief, as petitioner in No. 76–1471, we argued that diversification of media ownership, although it is an important component of the public interest, need not be presumed to override other weighty public interest considerations, such as the public interest in maintaining continuity of service.

Diversification of media ownership as a public interest objective has been reflected for many years in the FCC's multiple ownership rules, as amended,[6] as well as in *ad hoc* comparative [7] and non-comparative licensing proceedings.[8] These earlier multiple ownership rules codified Commission policy that license applications for a new station would be denied, subject to waiver, if a grant of the application would result in certain kinds of broadcast ownership concentration.[9] In circumstances not covered by rule, the Commission processed each application for a new station on a case-by-case basis. Newspaper ownership of broadcast stations fell into this latter category.[10] This was because there were strong public interest reasons for encouraging newspaper publishers to enter broadcasting, notwithstanding the possible effects on media concentration. As a matter of policy, therefore, the Commission found it useful to consider newspaper ownership on an *ad hoc* basis in comparative and non-comparative situations where applicants for new stations were involved. 50 FCC 2d at 1046 n.1, 1050 (App. 135 n.1, 142).[11] Even without a rule, however, a broadcast applicant's other media holdings, including its newspaper interests,[12] could be sufficient in a specific case to warrant outright disqualification,[13] or could be decisive in determining that the license should go to a competing applicant with fewer media interests.[14] After forty years of following this *ad hoc* approach, the Commission decided to reexamine its position to determine whether changes in the industry warranted a different policy.

[6] *Multiple Ownership of Standard Broadcast Stations* (AM radio), 8 Fed. Reg. 16065 (1943); *Rules and Regulations Governing Television Broadcast Stations*, 6 Fed. Reg. 2284 (1941); *Rules Governing High Frequency Broadcast Stations* (FM radio), 5 Fed. Reg. 2382, 2384 (1940); *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 18 FCC 288 (1953), 45 FCC 1476 (1964), 22 FCC 2d 306 (1970) (App. 33).

[7] *See, e.g., McClatchy Broadcasting Co.* v. *FCC*, 239 F. 2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957); *Scripps-Howard Radio* v. *FCC*, 189 F. 2d 677 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951); *Plains Radio Broadcasting Co.* v. *FCC*, 175 F. 2d 359 (D.C. Cir 1949).

[8] *See Clarksburg Publishing Co.* v. *FCC*, 225 F. 2d 511 (D.C. Cir. 1955).

[9] *See United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

[10] The Commission once considered a rule prohibiting newspaper-broadcast cross-ownership but decided against it at that time. *Newspaper Ownership of Radio Stations* (Notice of Dismissal of Proceeding), 9 Fed. Reg. 702, 703 (1944).

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This is the type of determination which Congress and the courts generally have left to the Commission's discretion. Congress has never adopted legislation specifically addressing newspaper-broadcast combinations, although it has considered such legislation.[15] Nor have the courts required any particular ap-

[11] A non-comparative situation exists when only one applicant applies for a broadcast license. A comparative situation exists when more than one applicant applies for a broadcast station but for technical reasons only one may be authorized. In these situations, the FCC must determine first whether each applicant possesses the necessary threshold qualifications. If more than one applicant is qualified, then a selection is made from among the competing qualified applicants in what is generally referred to as the comparative aspect of the administrative proceeding. *See Ashbacker Radio Co.* v. *FCC*, 326 U.S. 327 (1945).

[12] *See* note 8, *supra*. *See also Allied Broadcasting, Inc.* v. *FCC*, 435 F. 2d 68, 70 (D.C. Cir. 1970).

[13] *See* note 8, *supra*.

[14] *See McClatchy Broadcasting Co.* v. *FCC*, *supra*, 239 F. 2d 15.

[15] *E.g., H.R. Rept. No.* 2426 (Conference Report), 82nd Cong., 2nd Sess. 18–19 (1952) (conference committee omitted House provisions forbidding "discrimination" against newspaper owners in licensing decisions, stating that the FCC was not authorized to "discriminate" against an applicant because of its interest in a newspaper).

proach to cross-ownership,[16] although in recent cases, during the pendency of the Commission's rule making proceeding, they approved the agency's practice of deferring consideration of structural cross-ownership questions to await a final decision in Docket No. 18110. *See, e.g., Hale* v. *FCC*, 425 F. 2d 556, 560 (D.C. Cir. 1970). The Commission's newspaper-broadcast cross-ownership policy thus has evolved administratively as the broadcast industry has matured, its most recent statement coming in the rules now under review.[17]

II. THE COMMISSION DECISION

In its *Further Notice of Proposed Rulemaking*, the Commission invited comment on whether changed circumstances warranted a prospective ban on co-located newspaper-broadcast combinations and dissolution of existing radio-television and newspaper-broadcast combinations through divestiture. 22 FCC 2d 339 (App. 101). The option of limiting new ownership restrictions to prospective effect was consistent with the

[16] *See Pinellas Broadcasting Co.* v. *FCC*, 230 F. 2d 204, 208–209 & n. 6 (D.C. Cir.), *cert denied*, 350 U.S. 1007 (1956). This Court did say, in dictum, that the public interest standard might permit denial of a license application "when the publisher of the sole newspaper in the area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication." *United States* v. *Radio Corp. of America*, 358 U.S. 334, 351–352 (1959).

[17] While the Commission was considering cross-ownership in the proceeding now under review, Congress was having hearings of its own on proposed legislation that included provisions dealing with newspaper-broadcast combinations. Both houses of Congress were aware of the FCC's proceeding. The House adopted legislation that would have forbidden the FCC from considering newspaper ownership at renewal time unless it had adopted rules addressing the matter. The Senate deleted that provision, but directed the FCC to complete its proceeding by 1975. *See H.R. Rept. No.* 93–961, 93rd Cong., 2d Sess., March 26, 1974; *S. Rept. No.* 93–1190, 93rd Cong., 2d Sess., Sept. 27, 1974. See also *Congressional Quarterly Almanac* (Vol. xxx), pp. 714–717 (1974), for a summary of Congressional action on the legislation. Although Congress followed the Commission's proceeding closely, it took no action to change the result through legislation.

Commission's earlier approach in this area, see note 6, *supra*, and involved fewer complications than the divestiture proposal. 50 FCC 2d at 1047 (App. 137). The justification for the proposed new rule was the same as it had been for amending the rules in the past: "promoting competition among the mass media involved, and maximizing diversification of service sources and viewpoints . . . ." 22 FCC 2d at 346 (App. 115). However, because the proposed rule would disqualify newspaper owners within a limited geographic area, the Commission asked the parties to address themselves to whether the proposal was within the Commission's statutory authority and was constitutionally permissible. 22 FCC 2d at 349 (App. 121). These were the first questions the Commission addressed in the *Second Report and Order*.

A. THE COMMISSION'S AUTHORITY

Whether it acts in individual cases or through rule making, the Commission must consider the qualifications of a licensee or applicant, and multiple ownership has long been included in that consideration. 50 FCC 2d at 1074 (App. 189). The multiple ownership rules, the Commission explained, rest on two foundations: the related goals of diversity of viewpoints and economic competition. 50 FCC 2d at 1074 (App. 189). In fostering economic competition, the Commission's public interest licensing function draws support from the antitrust laws; in achieving diversity in the marketplace of ideas, its policy is derived from the First Amendment. "The term public interest encompasses many factors including 'the widest possible dissemination of information from diverse and antagonistic sources.' *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)." 50 FCC 2d at 1048 (App. 139). The Commission found ample authority to adopt rules in furtherance of its long-standing diversification policy both in the

Communication Act[18] and in the opinions of this Court.[19] 50 FCC 2d at 1048–49, 1074 (App. 138–140, 189).

The Commission rejected the arguments of those challenging the rule as a violation of the First Amendment. As the Commission explained, these parties simply overstated their case when they claimed that the Commission was attempting to inhibit a newspaper owner's freedom to publish by preventing him from having an interest in a broadcast station.

First, the Commission concluded, the rule follows a well-established policy of permitting the Commission to promote diversity of viewpoints consistent with First Amendment principles; second, the First Amendment does not protect the press from lawful business regulation or exempt it from the public interest standard governing the issuance of broadcast licenses; and third, the rule does not prohibit newspaper owners from engaging in broadcasting, but only forbids the creation of new combinations in the same community. This distinction, the Commission further found, does not create an arbitrary and capricious classification based on irrelevant standards in violation of the Fifth Amendment. 50 FCC 2d at 1050 (App. 143). The rule deals similarly with non-newspaper owners who seek to create new co-located media combinations, *e.g.*, television licensees who might apply for another broadcast facility in the same community: "both are barred from doing so." 53 FCC 2d at 592 (App. 324).

The Commission also was not persuaded by the invocation of opinions and discussions by an FCC General Counsel in 1937 and a Commission chairman and members of Congress in the 1940's and 1950's suggesting that the Commission either could not or would not bar newspaper owners from the broadcast field. The Commission stated that it was free to reassess its jurisdiction and its prior policies, as it had done in the cable television area. The Commission pointed out also that these

[18] 47 U.S.C. §§ 152(a), 154(j), 301, 303, 309.

[19] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *United States* v. *RCA*, *supra*, 358 U.S. 334.

early discussions did not focus on the narrow question of newspaper-broadcast cross-ownership in the same community, which is the relevant question in this case. Finally, whatever may have been the views of former Commission personnel and members of Congress many years after adoption of the 1934 Act, the Commission stated that no legislation was ever adopted to govern newspaper cross-ownership and that it is impossible to discern any mandate from Congress on the matter. The Commission said it was responding many years later to changed conditions in the industry and emphasized that it was only barring new newspaper-broadcast combinations in the same area. 50 FCC 2d at 1051 (App. 144–145).

Confident that a newspaper-broadcast cross-ownership rule was within its statutory authority and constitutionally permissible, the Commission turned its attention to "how much diversity to seek in terms of providing the best practicable service to the American public." 50 FCC 2d at 1074 (App. 189–190).

B. THE PROSPECTIVE RULE

As discussed at length in the Commission's opening brief, *see* pp. 10, 13, 22, the record in this proceeding did not show a pattern of abuses arising out of cross-ownership. 50 FCC 2d at 1072, 1085, 1089 (App. 186, 211, 219). For this reason, *inter alia*, widespread divestiture of existing cross-owned combinations was unwarranted. This did not mean, however, that no rules should be adopted, for the record also did not demonstrate a continuing need to encourage new newspaper-broadcast combinations in light of changed circumstances. 50 FCC 2d at 1072–1074, 1079 nn. 27 & 28 (App. 185–88, 199–200 nn. 27 & 28).

The Commission observed that the "broadcast medium ha[d] m .tured," that newspaper owners were no longer the "sole reservoir" of relevant experience, and that the number of broadcast channels remaining open for new licensing had "vastly diminished." Without denigrating the contributions of newspaper owners to the development of broadcasting or suggesting that existing combinations were not serving the public interest, the Commission concluded that its rules should bar

all new licensing that would not add to diversity." 50 FCC 2d at 1074–1075 (App. 190–191). Since the prospective rule could foster diversity without the disruption that would attend dissolution of existing combinations, the Commission found no persuasive countervailing considerations that would require a less restrictive prospective rule.[21]

Thus, finding changed circumstances which no longer required it to encourage or even permit licensing of new newspaper-broadcast combinations, the Commission adopted a flat prospective ban against cross-ownerships, whether created by initial application and construction or by acquisition.[22] The new policy was based on an effort to advance the Commission's long-standing policy of promoting diversification of ownership in the hope that it would offer diversity in the marketplace of ideas—a "worthwhile" goal not dependent on its being "urgent to be justified." [23] The Commission conceded that diversification of ownership offered no guarantee of diversity of viewpoints.[24] However, in the case of future licensing, even a small or "hoped for" gain in diversity was worth pursuing. There would be no disruption

[21] This is not the first time the FCC has balanced the need to develop a broadcast service against the desire to promote diversity. The Commission took the same balancing approach in 1964 when it decided no longer to allow signal overlap situations between commonly owned or controlled stations, a situation accepted in the pioneering days. *Multiple Ownership of Standard, FM and Television Broadcast Stations, supra*, 45 FCC at 1481. In this proceeding, the Commission again took this approach with respect to future AM-FM radio combinations. However, the Commission concluded that conditions had not changed sufficiently to warrant restrictions and that, for the time being, licensees of AM stations would still be encouraged to apply for co-located FM channels. The Commission was mindful that in a comparative proceeding, the applicant with fewer media holdings might be preferred. 50 FCC 2d at 1055 (App. 152).

[22] *Id.* at 1066–1067 & n. 18, 1076 (App. 174–175 & n. 18, 193). The Commission did provide for waiver in exceptional circumstances. *Id.* at 1077 (App. 196).

[23] *Id.* at 1074–1078 (App. 188–196).

[24] *Id.* at 1048, 1076 (App. 138–139, 193).

[25] *Id.* at 1076, 1078 (App. 193, 196–198).

of existing service and the Commission could focus solely on this abstract goal.[25]

Since newspaper owners were not disqualified as a group from becoming broadcast licensees, the rule prohibits only new co-located combinations. The rule operates this way: (1) a single party may not buy both parts of a co-located newspaper-broadcast combination; (2) if a broadcast licensee acquires a daily newspaper in the same market, it must dispose of its license within a year or by the time of its next renewal date, whichever comes later; and (3) no newspaper owner may obtain a license for a broadcast station in the same market, either by transfer or by original licensing.[26] The rule does not affect newspaper ownership of stations outside the community of publication.[27]

III. THE DECISION BELOW

The court of appeals affirmed the prospective rule, holding (1) that a legislative type policy judgment intended to increase diversity was not arbitrary or capricious even though its benefits were speculative; [28] (2) that the Commission acted within its authority in restricting newspaper ownership of broadcast stations by rules; [29] and (3) that a rule forbidding the creation of co-located newspaper-broadcast combinations does not violate press freedoms guaranteed under the First Amendment.[30]

The court of appeals viewed the prospective rule as a natural outgrowth of earlier amendments to the FCC's multiple

[25] *Id.* at 1076 (App. 193).

[26] *Id.* at 1074–76, 1099–1107 (App. 190–193, 243–263).

[27] On petitions for reconsideration, the Commission reaffirmed its rules and policies in all substantial respects. 53 FCC 2d 589 (App. 317). The petitioners then invoked the jurisdiction of the court of appeals pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

[28] 555 F. 2d at 948–951 (App. 365–374).

[29] *Id.* at 951–952 (App. 374–381).

[30] *Id.* at 953–955 (App. 381–388).

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ownership rules, consistent with the Commission's broad mandate to respond to changing conditions, to adopt eligibility standards for licensees, and to encourage a more effective use of communications. 555 F. 2d at 944, 947–948 (App. 350–351, 363). The court agreed with the Commission that the record contained "little reliable 'hard' information." *Id.* at 956–957 (App. 395–396). But it recognized that the rule reflected a "legislative type policy judgment," *id.* at 948 (App. 364), and that similar rules had been adopted in the past without "compiling a substantial record of tangible harm," *id.* at 944 (App. 351). Accordingly, the Commission's decision was not to be disturbed if it was rational and did not exceed the agency's authority or violate the First Amendment. *Id.* at 948 (App. 365).

The court held that the prospective rule has a rational basis because the public interest standard invites reference to the First Amendment principle that dissemination of information from diverse and antagonistic sources serves the public interest. Since there is limited access to the airwaves, the court found nothing irrational in the FCC's attempt "to provide diversity by allocating stations to those without control over an alternative major media voice". *Id.* at 949 (App. 368–369). The fact that gains might be speculative did not, in the court's view, make the attempt irrational. *Id.* at 950 (App. 373).

Making co-located newspaper-broadcast ownership a threshold disqualifying factor to govern future licensing did not exceed the FCC's statutory authority, the court stated, particularly when the importance of diversification had been established. The court held that the Commission's authority to particularize standards by adopting licensee qualifications through the rule making process was settled long ago by this Court in *United States* v. *Storer Broadcasting Co., supra*, 351 U.S. 192. 555 F.2d at 951 (App. 375–376). The court agreed with the Commission that neither a former FCC General Counsel's views in 1937 nor subsequent legislative activity between 1946 and 1952 evidenced a Congressional intent to prohibit the Commission from adopting rules premised on what the public interest might require in 1977. *Id.* at 951–952 & n. 41. (App. 376–378 &

n. 41).[23] As for the dicta in an earlier decision by the same court suggesting that the Commission lacked the authority to ban newspaper owners from becoming licensees, the court distinguished that case as "based on a reading of the Communications Act that has not prevailed." *Id.* at 952 (footnote omitted) (App. 380–381).

Finally, the court of appeals dismissed the claim that the prospective rule violates press freedoms guaranteed by the First Amendment. The denial of a license because the public interest requires it, the court stressed, has been held repeatedly not to be an abridgment of an applicant's First Amendment rights. *Id.* at 953 (App. 382). While the prospective ban may burden the right to publish, that in itself does not make it unconstitutional. The court summarized its First Amendment holding:

> The ban neither mandates nor prohibits what may be published. It only forbids the formation of co-located combinations the Commission has determined do not serve the public interest. Of course, in serving the public interest the ban may indirectly affect the economics of publication, but the First Amendment does not provide a shield against this. *Associated Press* [*supra*], 326 U.S. at 20, 65 S. Ct. 1416.

555 F. 2d at 954 (App. 386–387). In sum, the court of appeals affirmed the validity of the prospective rule in every respect.[24]

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[23] The court summarily rejected the contention that the Commission was attempting to regulate an industry over which it had no jurisdiction. The court emphasized that the prospective rule only imposes qualifications for broadcast licensees, not regulations governing the conduct of the newspaper industry. *Id.* at 952 n. 41 (App. 378 n. 41). Equally unmeritorious was the argument that this rule violated the equal protection clause of the Fifth Amendment. The rule had a rational basis and did not trench upon First Amendment freedoms, thus making strict scrutiny unnecessary. *Id.* at 953 n. 44 (App. 381 n. 44).

[24] In affirming the Commission's prospective rule the court concluded that the future ban was not arbitrary simply because it was based on only one factor. In the court's view, the Commission explained why diversity was an important goal and anchored that explanation to decisions of this Court, 555 F. 2d at 950 n. 33 (App. 373–374 n. 33). *See* Argument, *infra* at pp. 17–20.

SUMMARY OF ARGUMENT

In formulating a prospective rule dealing with newspaper-broadcast cross-ownership, the FCC naturally looked beyond the record of this particular proceeding and drew upon its accumulated experience. This was both necessary and appropriate since the Commission was attempting to provide for the future and had to rely heavily on policy judgments in making its decision. Aware of this reliance on policy, and mindful too that its function was not to substitute its judgment for that of the agency, the court below held that the prospective rule was rational, was within the FCC's statutory authority, and violated no rights protected by either the First or Fifth Amendment. In reaching that conclusion, the court of appeals rejected the challenges of Petitioners ANPA and NAB on the ground that their arguments were based on a reading of the Communications Act which has not prevailed.

A. Over the last forty years the Commission's multiple ownership rules, as amended, have proscribed common ownership of broadcast stations within defined geographic areas and have placed a ceiling on the overall number of stations which could come under common control by a single entity. These rules are justified in the public interest because they seek to prevent monopoly of the economic marketplace and to encourage a maximization of diverse viewpoints—objectives which find support in the nation's antitrust laws and the First Amendment.

These same considerations have long justified taking newspaper ownership into account in deciding whether to grant new licenses, both in non-comparative and comparative situations. Indeed, newspaper ownership became a relevant, well-established and judicially approved public interest factor long before the subject rule making proceeding was initiated. Previously, though, there was good reason for not banning co-located newspaper-broadcast cross-ownership at the threshold, for newspaper ownership provided a valuable source of applicants experienced in journalistic traditions at a time when the broadcast industry was in its infancy.

The Commission determined in this proceeding, however, that circumstances had changed. Newspaper owners were no

longer the sole reservoir of relevant experience; the pioneering spirit they were encouraged to bring to the industry was no longer needed from new applicants. Moreover, broadcasting remained an unusual medium, the number of channels available for use being severely limited. Indeed, it was for this reason that the diversification policy rationally furthered the public interest in having access to diverse news and opinion sources. The prospective rule merely extended the multiple ownership rules to consider newspaper ownership. The policy of promoting diversity outweighed the need to continue to solicit entry by other media owners to develop what was no longer an infant industry. This response to changed conditions was entirely rational, particularly since it would not cause any disruption to existing services operating in the public interest.

B. In 1934, Congress, through the Communications Act, granted the FCC broad discretion to regulate broadcasting in the public interest. Subsequent Congressional activity in the 1940's and 1950's should not be construed as diminishing that discretion. It is true that individual members of Congress during that period expressed reservations about the FCC's authority to bar newspaper-broadcast cross-ownership.[28] Ultimately, however, the wide discretion originally conferred in the Act was left unaltered. Any contrary suggestions—either by Congress or the judiciary—were subsequently put to rest by this Court's affirmation of the FCC's authority to adopt rules to bar at the threshold applicants with other media outlets. *See United States* v. *Storer Broadcasting Co., supra*, 351 U.S. 192.

C. The possibility that the prospective rule indirectly burdens the publishing of a newspaper does not mean that this rule unconstitutionally trenches upon protected press freedoms guaranteed by the First Amendment. The rule simply represents a judgment by the Commission as to when it is in the public interest to grant a broadcast license. There

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[28] On the other hand, more recent Congressional activity apparently endorsed that authority. This is why interpretations of a law by members of a different Congress many years later usually have little significance.

is no First Amendment right to broadcast comparable to the right of every individual to speak, write or publish; rather, it is the right of the public which controls. Therefore, denial of a broadcast license, if deemed necessary to serve the public interest, is not a denial of free speech. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

Moreover, these regulations do not attempt to scrutinze what is said or to stamp out expression. Placing broadcast licenses in the hands of those without alternative means of expression is an established public interest broadcast policy based upon furthering a legitimate governmental interest. Indeed, it is the First Amendment which supports that policy. Just as the First Amendment does not provide the press with an exemption from the commands of other statutes, *e.g.*, the antitrust laws, so it does not grant a publisher immunity from the public interest standard of the Communications Act. And since this rule does not affect only newspapers, but also bars a television licensee from acquiring another broadcast station in the community in which he already broadcasts, it rests on a reasonable classification consistent with the due process clause of the Fifth Amendment.

ARGUMENT

Once the FCC has made its public interest determination, the narrow question on judicial review is whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414, 416 (1971). On review, the wisdom of the rule is not at issue, *National Broadcasting Co.* v. *United States, supra*, 319 U.S. at 224. That a court "might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem [of deciding how the public interest will be served] to the latter." *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). *See Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra*, 401 U.S. at 416. When

an agency's decision is based primarily on policy considerations it is even more to be respected; in fact, it is "entitled to the greatest amount of weight by appellate courts." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 209 (1947).[24]

In reviewing the Commission's rule prohibiting future formation of co-located newspaper-broadcast combinations, the court below assumed the proper role of a reviewing court. Aware that the prospective rule reflected a "legislative type policy judgment," it reviewed the decision only to insure that the regulation was not arbitrary or capricious and that it did not exceed the Commission's authority or violate the First Amendment. 555 F. 2d at 948 (App. 364–365). The court found no error in the Commission's decision. We believe the court of appeals' decision in this regard was entirely correct.

THE RULE PROHIBITING FUTURE NEWSPAPER-BROADCAST COMBINATIONS IN THE SAME CITY IS RATIONAL, LAWFUL AND BASED UPON RELEVANT PUBLIC INTEREST FACTORS

A. It was well established before this rule making proceeding began that newspaper ownership was a relevant public interest consideration in the Commission's licensing scheme

The purpose of the Communications Act is to protect the public interest in communications. *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4, 14 (1942). This Court, in its earliest opinions construing the Act, recognized that Congress intended for the Commission, in regulating broadcasting in the public interest, to act to preserve competition and prevent monopoly. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474–476

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[24] In reviewing the "grandfather" clause and limited divestiture rule the court also recognized that the Commission's decision had to be based primarily on policy considerations. 555 F. 2d at 957. (App. 396). When it came to reviewing those rules, however, the court elevated diversity from a very important public interest factor to a virtually irrebuttable presumption against cross-ownership. The Commission has argued in its opening brief, No. 76-1471, that this was error.

(1940). The Commission was not to be only a "traffic officer, policing the wave lengths to prevent stations from interfering with each other." *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 215. The Commission had broad authority to carry out its public interest licensing functions, Sections 1, 4(i), 301 and 303 of the Communications Act, 47 U.S.C. §§ 151, 154(i), 301 and 303, and this broad authority provided the basis for rules dealing with concentration of media control, despite the absence of specific provisions in the Act. *National Broadcasting Co.* v. *United States, supra,* 319 U.S. 190 (chain broadcasting regulations); *United States* v. *Storer Broadcasting Co., supra,* 351 U.S. 192.[35] The public interest standard of the Communications Act invited reference to the nation's antitrust laws [36] and the First Amendment,[37] and these Commission actions promoting diversified ownership of the mass media drew support from both. Diversification of media ownership had been an important regulatory goal in part because of the Commission's disability, 47 U.S.C. § 326, and traditional reluctance to review particular programming decisions.[38] In attempting to secure diversity without government supervision of speech, the Commission had looked to the ownership by license applicants of interests in other media, including CATV, AM and FM radio, TV, motion pictures and newspapers. *See Allied Broadcasting, Inc.* v. *FCC, supra,* 435 F. 2d at 70.

Newspaper owners were never disqualified from owning and operating broadcast stations. In fact, many of them were

[35] *See also General Telephone Co. of the Southwest* v. *United States,* 449 F. 2d 846 (5th Cir. 1971) (telephone companies prohibited from owning CATV systems in their telephone service areas); *Mt. Mansfield Television Inc.* v. *FCC,* 442 F. 2d 470 (2d Cir. 1971) (prime time access, financial interest, and syndication rules).

[36] *United States* v. *Radio Corporation of America, supra,* 358 U.S. at 351; *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 222-224.

[37] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 122 (1973).

[38] *Selling of the Pentagon,* 30 FCC 2d 150 (1971); *see also Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 127.

pioneers in developing both radio and television, bringing both media needed revenues and journalistic tradition. Diversification was only one important public interest factor, and for a long time did not outweigh the public interest in encouraging the development of the media by those most likely and willing to step forward.[39] And in renewal proceedings, where existing cross-owners with affirmative records of service in the public interest sought renewal of their licenses, diversification has been regarded as less important than the established service record.[40]

In the past, the Commission's position was that while a blanket prohibition did not serve the public interest, newspaper affiliation was a relevant consideration in determining the comparative qualifications of applicants for a new facility.[41] Diversification of mass media was, in this context, an appropriate consideration for the Commission in the exercise of its public interest licensing function. *See Plains Radio Broadcasting Co.* v. *FCC, supra,* 175 F.2d 359. *Accord,*

[39] Because FM radio has not sufficiently matured, the Commission has decided not to bar the grant of an FM station to an AM licensee in the same city. It concluded that AM owners might be the most likely parties to apply for FM channels which might otherwise remain silent. 50 FCC 2d at 1054-1055 (App. 151-152).

[40] *See* 50 FCC 2d at 1087-1088 (App. 214-218); *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 n. 1, 394-395 (1965); *Coules Floridia Broadcasting, Inc.,* 62 FCC 2d 953, 956-958 (1977), *appeal pending sub nom. Central Florida Enterprises, Inc.* v. *FCC,* No. 76-1742 (D.C. Cir.); *Policies Relating to the Broadcast Renewal Applicant,* 40 Pike & Fischer Rad. Reg. 2d 763, 775-776 (1977), *review pending sub nom. National Black Media Coalition* v. *FCC,* No. 77-1500 (D.C. Cir.) *Cf.* S. Rept. No. 44, 82nd Cong., 1st Sess. 7 (1951); H.R. Rept. No. 1750, 82nd Cong., 2d Sess. 8 (1952). These congressional reports explain the 1952 amendment deleting a former provision in Section 307(d) of the Communications Act, 47 U.S.C. § 307(d), which stated that the same considerations must apply to both renewal applications and original applications.

[41] *Policy Statement on Comparative Broadcast Hearings, supra,* 1 FCC 2d at 394-395.

Scripps-Howard Radio v. *FCC*, *supra*, 189 F. 2d 677; *McClatchy Broadcasting Co.* v. *FCC*, *supra*, 239 F. 2d 15. *Compare Stahlman* v. *FCC*, 126 F. 2d 124 (D.C. Cir. 1942). *See* discussion at pp. 22–23, *infra*. The diversification criterion could be decisive in comparative license hearings. *McClatchy Broadcasting Co.* v. *FCC*, *supra*.

Even in a non-comparative proceeding, an applicant's newspaper interests were relevant in determining whether grant of another station to a multiple media owner would be in the public interest. *Clarksburg Publishing Co.* v. *FCC*, *supra*, 225 F. 2d 511. In fact, this Court has suggested that in an appropriate case antitrust considerations alone might keep the statutory public interest standard from being met, "as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication." *United States* v. *RCA*, *supra*, 358 U.S. at 351–352.

In light of this history, the prospective rule was not a sudden reversal of Commission policy, but rather a change in emphasis in conformity with the developing public interest standard. *Cf. General Telephone Company of the Southwest* v. *FCC*, *supra*, 449 F. 2d at 864 n. 17. The court below found that barring newspaper-broadcast cross-ownership was a rational outgrowth of the Commission's long-standing and judicially endorsed diversification policy. Although the Commission had conceded that diversification of ownership may not guarantee diversity of viewpoints, the court heeded this Court's teaching that regulations are not irrational even though " 'the possible benefits of competition do not lend themselves to detailed forecast. *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 96. . . .' " 555 F. 2d at 950 (App. 373). In sum, the rationality of granting licenses to those without alternative means of expression in the same community was well established long before this prospective rule was adopted.

B. The prospective rule does not exceed the FCC's statutory authority simply because newspaper ownership is now brought within its ambit

In former years it was in the public interest to encourage newspaper owners to apply for vacant channels. Conditions had changed, however; the industry had matured, there was a scarcity of available channels remaining open for new licensing, and other qualified and experienced applicants could be expected to step forward. Even if the prospective rule provided only a small gain in diversity, that was a worthwhile goal since there were no countervailing public interest factors to outweigh its singleminded pursuit, 50 FCC 2d at 1066 n. 18, 1067, 1075–1076, 1078 (App. 174 n. 18, 175, 190–193, 197). The decision to proceed by rule making rather than defer the entire problem to the uncertainties of case-by-case adjudication was a choice which "lies primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery*, *supra*, 332 U.S. at 203.

In *United States* v. *Storer*, *supra*, 351 U.S. 192, this Court upheld a portion of the FCC's multiple ownership rules as consistent with the Commission's authority to announce by rule "its attitude on public protection against [concentration]." 351 U.S. at 203. Petitioner ANPA argues that neither the Communications Act (Sections 47 U.S.C. 309(a), 303(r), 154(i)) nor the *Storer* decision, which only involved limitations on the total number of broadcast stations licensed to a single entity, supports the FCC assertion of authority to ban newspaper owners from applying for a broadcast station.[42]

This argument is misconceived. Petitioner ANPA concedes that diversity was well-established as one of many factors bearing on the public interest.[43] From there, however, peti-

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[42] *See* petitioner's brief in No. 76–1604 at pp. 29–34.

[43] ANPA brief at p. 31. It is not at all clear whether petitioner is arguing that newspaper ownership may only be considered as one of many relevant factors in a comparative proceeding between qualified applicants, *see, e.g.*, *McClatchy Broadcasting Co.* v. *FCC*, *supra*, 239 F. 2d 15, or whether ANPA agrees that such ownership can be a proper factor for disqualifying an unopposed applicant, but only in the course of an administrative hearing. *See, e.g., Clarksburg Publishing Co.* v. *FCC*, *supra*, 225 F. 2d 511. Whichever interpretation is correct, it is clear that petitioner challenges the FCC's authority to adopt a rule making a newspaper owner ineligible for a grant of a

tioner proceeds on the assumption that it must forever remain only one of many factors. Once the Commission determined that the public interest would not be served by creating any new, co-located newspaper-broadcast combinations, however, the court of appeals correctly stated that it "requires no extension of *Storer*" to sustain the Commission's "statutory authority to impose the prospective ban." [44] The significance of *Storer* is not limited to its affirmance of the specific ownership rules at issue, but extends to its recognition of agency authority to bar at the threshold, without a hearing, those who do not meet public interest qualifications. To interpret the case otherwise would, as the court below stated, deprive the FCC of its lawful authority to adopt licensee qualifications. *See* 47 U.S.C. § 308(b).[45]

Equally unavailing is the reliance placed by petitioners on dicta contained in the 1942 decision of the court of appeals in

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license in the city where its newspaper circulates. As discussed above, this contention is without merit.

[44] 555 F. 2d at 951 (App. 376).

[45] 555 F.2d at 950–951 n. 33 (App. 373–374 n. 33). In *U.S.* v. *Storer, supra,* it appears that this Court recognized that the Commission acts properly when it considers diversification as both a comparative factor and for the purpose of codifying threshold licensee qualifications. 351 U.S. at 203 n. 12.

Petitioner NAB in No. 76–1595 at brief pp. 23–24 argues that *Storer* restricts the Commission's rule making authority to limitations on the number of stations licensed to one entity and does not permit FCC regulations concerning newspaper publication, a field over which, according to petitioner, the Commission has no authority. Petitioner NAB cites the decision in *GTE Service Corporation* v. *FCC*, 474 F. 2d 724 (2d Cir. 1973), in support of its position that the Commission has no jurisdiction over newspapers. The analogy fails. First, the Commission exercised no such jurisdiction; it only set forth standards governing its own radio and television licensing function. Second, the rules here are not designed to protect newspapers from unfair competition. In *GTE*, the Second Circuit struck down Commission regulations which appeared to have this intent with respect to the data processing industry, an industry over which the Commission admittedly had no jurisdiction. And third, the Second Circuit specifically distinguished the case before it from others where the Commission properly was concerned with competitive implications in markets over which it had jurisdiction, 474 F. 2d at 734, citing *Mansfield Journal Co.* v. *FCC*, 180 F. 2d 28 (D.C. Cir. 1950). The court of appeals below also rejected this argument. 555 F. 2d at 952 n. 41. (App. 378 n. 41).

Stahlman v. *FCC, supra,* 126 F. 2d at 127, stating that the FCC lacked statutory authority to impose a ban on newspapers as such.[46] First, the dicta was unnecessary, for, as the concurring Judge noted, common control of newspapers and broadcast stations was not at issue. Second, this early decision did not give the issue of cross-ownership the type of considered analysis which should have been controlling or persuasive in the type of case which was before the same court in this proceding. *See National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F. 2d 601, 619–620 (D.C. Cir. 1976). More importantly, however, as the court below correctly stated, ". . . *Stahlman* was based on a reading of the Communications Act that has not prevailed." 555 F. 2d at 952 (App. 380–381). *See id.* at n.43 (App. 381 n.43.). It is evident from the later reliance upon *Stahlman* in *Storer Broadcasting Co.* v. *United States*, 220 F. 2d 204, 208 & n. 1 (D.C. Cir. 1955), *rev'd, United States* v. *Storer, supra,* 351 U.S. 192, that the court of appeals labored under the misconception that the FCC generally lacked the statutory authority to adopt rules providing for the disqualification of applicants on the basis of a particular factor, be it newspaper ownership (as in *Stahlman*) or other broadcast interests (as in *Storer*). This misreading of the Act was based on the notion that, with only limited exceptions, license applications could not be denied except on a case-by-case basis and after a full hearing. This interpretation was later squarely rejected by this Court. *United States* v. *Storer, supra,* 351 U.S. 192.

Finally, petitioners mount an assault against the validity of the prospective rule by claiming that both a legal opinion by the FCC's General Counsel in 1937 and Congressional activity between 1943 and 1952 indicate that the FCC lacks the statutory authority to adopt the prospective rule.[47] The construction of the Act which petitioners wish to infer from these

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[46] *See* petitioner's brief in No. 76–1604 at pp. 37–38; petitioner's brief in No. 76–1595 at pp. 16–17.

[47] *See* petitioner's brief in No. 76–1604 at pp. 34–37; petitioner's brief in No. 76–1595 at pp. 18–20.

statements subsequent to its passage is simply not supported, however, by opinions of this Court, the court of appeals and even more recent Congressional activity.

Petitioners present no evidence of legislative intent by those responsible for passage of the 1934 Communications Act that the public interest standard could never permit a ban against co-located newspaper-broadcast combinations. To the contrary, "[u]nderlying the whole law" is the recognition that broadcasting is a dynamic field and that the administrative process must possess "sufficient flexibility to adjust itself" to this reality. *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 138.

A former General Counsel's 1937 views on the limits of the FCC's statutory authority are also not conclusive. For many years the Commission assumed it lacked the statutory authority to regulate cable television. When it finally asserted jurisdiction—even after unsuccessful attempts to secure legislation—the reversal of its prior position was sustained by this Court. *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 164, 170 (1968). In any event, the former FCC General Counsel stated only that the Commission had no authority to deny licenses to newspaper owners as a matter of "public policy." He suggested at the same time that the Commission had authority to deny an application by a newspaper owner if, on the basis of all the facts, a grant would not serve the public interest. (App. 449). *See* 50 FCC 2d at 1051 (App. 144).[48]

Although the Congressional activity between 1943 and 1952 does indicate concern by subsequent Congresses that the Commission not bar newspaper owners as such from broadcasting, it does not provide guidance on the question whether the Commission has the authority to ban new newspaper-broadcast cross-ownership within the same community. The Commission rejected the argument based on this prior Congressional activity, primarily on the strength of its mandate to respond to changing conditions rather than to freeze as a matter of

[48] *See also* 555 F. 2d at 951–952 (App. 376–378).

statutory law what might have been viewed as in the public interest twenty-two years earlier. 50 FCC 2d at 1051 (App. 144–145).

The court of appeals agreed with the Commission's analysis and, in addition, it rejected petitioner ANPA's arguments on the broader ground that views on the meaning of a statute by another Congress many years later have little significance. 555 F. 2d at 952 n. 41 (App. 378 n. 41).[49] The wisdom of this approach finds support in recent Congressional activity, during which the relevant House and Senate Committees were explicitly aware of the Commission's newspaper cross-ownership rule making proceeding and voiced no objection. Indeed, the House passed legislation which would have prevented consideration of cross-ownership at renewal time unless the FCC had first adopted rules governing cross-ownership. The Senate deleted that provision in its version of the legislation, but directed the FCC to complete its rule making proceeding by 1975. *See H.R. Rept. No. 93–961,* 93rd Cong., 2d Sess. (1974); *S. Rept. No. 93–1190,* 93rd Cong., 2d Sess. (1974). *See also Congressional Quarterly Almanac* (Vol. XXX), pp. 714–717 (1974). Again, although Congress closely observed the Commission's rule making and had hearings of its own at the very time the Commission was holding oral argument in its docket, Congress adopted no legislation with regard to newspaper cross-ownership. The most that should be inferred from the Congressional activity subsequent to 1934 is that Congress has left the Commission with the wide discretion originally conferred in the Act[50] by the Congress responsible for its adoption.[51]

[49] *United States* v. *Wise,* 370 U.S. 405 (1962). See also *United States* v. *Southwestern, supra,* 392 U.S. at 170.

[50] See *NBC* v. *U.S.,* supra, 319 U.S. 190.

[51] Putting aside the question of what interpretive weight should be accorded subsequent legislative attempts to amend a statute, it is not altogether clear that the Congressional activity between 1946 and 1952 even purported to view the FCC's authority as limited along the lines argued by petitioner. First, to the extent that Congress at that time viewed a ban against newspaper-broadcast cross-ownership unwise as a matter of public policy, its views only shed light on what policy it did not want the FCC to

Judicial opinions since this legislative history in the 1940's and early 1950's strongly support the Commission's statutory authority to codify its attitude on the public interest standard as it relates to newspaper-broadcast cross-ownership. *See, e.g., U.S.* v. *Storer, supra,* 351 U.S. 192; *Clarksburg Publishing Co.* v. *FCC, supra,* 225 F. 2d 511; *Greater Boston Television Corp.* v. *FCC,* 444 F. 2d 841, 859–860 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971). Where, as here, there is no "compelling evidence" of a contrary Congressional intent, this Court should not prohibit regulations "imperative for the achievement of an agency's ultimate purposes." *U.S.* v. *Southwestern Cable, supra,* 392 U.S. at 177, quoting from *Permian Basin Area Rate Cases,* 390 U.S. 747, 780 (1968).

C. The prospective rule promotes rather than impedes constitutional guarantees under the First Amendment in furtherance of a legitimate governmental objective

The Commission is authorized to grant and to renew broadcast licenses only when the public interest, convenience and necessity will be served thereby. 47 U.S.C. § 307(a); *see FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. 134. We have argued elsewhere in this brief that the Commission has properly concluded that it would not be in the public interest to grant a license to a new applicant who already owns another major communications outlet in the particular community involved, be it another broadcast facility or a daily newspaper. In view of this determination by the Commission, this Court's language in *National Broadcasting Co.* v. *United States, supra,* is dispositive of petitioners'[92] First Amendment attack upon the Commisison's rules:

> The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

319 U.S. at 226–227.

Broadcast frequencies are a scarce resource and therefore must be portioned out among applicants. Because of this scarcity, however, the courts long and consistently have recognized that the First Amendment has a meaning for broadcasting that is different from its meaning for other media of expression.[93] Thus, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 388. The First Amendment goal in broadcasting is an informed public.

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adopt rather than on whether the FCC had the statutory authority to do so. Even as a matter of policy, however, it is not altogether clear what rule Congress feared the Commission might adopt. It seems abundantly clear that it did not seek to deprive the Commission of its authority to deny a broadcast application to a newspaper owner where it would create a monopoly situation contrary to the public interest. *See* 98 Cong. Rec. 7399. This Court made the same observation, also relying, in part, on the House debates on the 1952 amendments. *United States* v. *RCA, supra,* 358 U.S. at 351–352. To the extent that Congress was concerned that there be no ban against newspaper owners as such, the Commission heeded that desire; the rules only affect newspaper owners seeking a station in the same city. It does not appear that Congress ever intended to deny the FCC the discretion to redefine the public interest in response to changed conditions. In the House debates on one proposed anti-newspaper disqualification amendment, *see* petitioner's brief in No. 76–1604 at p. 43, there was clear recognition that the important thing "is that the Commission should determine these applications solely on what is best for the convenience and necessity of the public." 98 Cong. Reg. 7399, *supra.*

[92] Petitioner ANPA's brief in No. 76–1604 at pp. 17–34; petitioner NAB's brief in No. 76–1595 at pp. 25–37.

[93] *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 388; *CBS* v. *DNC, supra,* 412 U.S. at 101; *Virginia Pharmacy Bd.* v. *Virginia Consumer Council,* 425 U.S. 748, 773 (1976); *Capitol Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582, 584 (D.D.C. 1971), *aff'd sub nom. Capitol Broadcasting Co.* v. *Acting Attorney General,* 405 U.S. 1000 (1972).

The "paramount right" belongs neither to the broadcasters, *id.*, nor to people who want access to broadcast facilities to expound their own views, *CBS* v. *DNC*, *supra*, 412 U.S. at 121–132. Rather, it is the right of the viewers and listeners that is paramount. As this Court succinctly put it in *Red Lion*:

> It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

395 U.S. at 390. *Compare Red Lion*, *supra*, 395 U.S. 367, and *CBS* v. *DNC*, *supra*, 412 U.S. 94, with *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). And the Commission's view concerning how best to regulate in furtherance of the public's paramount right can change over the years because, in this Court's words, "solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *CBS* v. *DNC*, *supra*, 412 U.S. at 102.

Petitioners' arguments seem to start from the assumption that newspaper owners have a special immunity from the public interest standard. Newspaper publishers, however, are not excused from the reach of valid regulatory policies, including the Commission's diversification policy. *See Associated Press* v. *NLRB*, 301 U.S. 103, 122–132 (1937); *Associated Press* v. *United States*, *supra*, 326 U.S. 1.[54] Indeed, the Commission's rules, designed to assure a diversity of viewpoints for the public, are not merely constitutionally permissible, but affirmatively promote First Amendment objectives. *Associated Press* v. *United States*, *supra*, 326 U.S. at 20; *See also* Judge Learned Hand's District Court opinion in the *Associated Press* case, 52 F. Supp. 362, 372 (S.D.N.Y. 1943); *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 390; *National Association of*

[54] This Court has routinely upheld application to the press of a variety of other laws. See *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, 382–383 (1973) and cases cited therein.

Theatre Owners v. *FCC*, 420 F. 2d 194, 208 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

More than anything else, the First Amendment means that the Government has "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972) (citations omitted). The regulations here, if anything, are farther from the primary concern of the First Amendment than comparable rules which have been upheld.[55] The prospective rule does not scrutinize what is said or attempt to stamp out expression. Nor does it attempt to deny anyone the right to publish.[56]

Petitioners simply cannot claim a wholesale exemption from the Commission's rules merely because they engage in publishing. Indeed, their argument was rejected long ago:

> Just as the First Amendment does not provide the press with immunity from the commands of the antitrust laws, so a newspaper, when it stands as an applicant for a radio license, may not rely on the First Amendment to

[55] *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, *supra*; *Mt. Mansfield Television, Inc.* v. *FCC*, *supra*, 442 F. 2d 470; *National Association of Independent Television Producers and Distributors* v. *FCC*, 516 F. 2d 526 (2d Cir. 1975).

[56] Petitioner ANPA in No. 76–1604 at pp. 18–19 argues that these regulations burden the press in the same manner as the regulations struck down in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936) and *Spieser* v. *Randall*, 357 U.S. 513 (1958). The court of appeals correctly found the reliance misconceived. In *Grosjean*, a tax was deliberately imposed to limit circulation of information to the public, "precisely the opposite" of what is imposed here. 555 F. 2d at 953 (App. 384). In *Speiser*, *supra*, 357 U.S. at 519, a tax exemption was conditioned directly on signing a loyalty oath, a condition which was intended to suppress constitutionally protected speech. 555 F. 2d at 954 n. 47 (App. 385–386 n. 47). A tax exemption is significantly different from obtaining a license contingent upon public interest findings. Moreover, the regulations here are not conditioned on suppressing one's ideas. The regulations only condition the privilege of broadcasting on having no ownership interest in a local newspaper. The right to publish a newspaper still exists. Exercising one's right to publish a newspaper, however, does not carry with it the right to demand that the FCC disregard the public interest in the granting of broadcast licenses.

> compel the Federal Communications Commission to disregard [the] public interest in considering its application. The mere fact of newspaper ownership has been held relevant in determining the qualifications of an applicant. *Plains Radio Broadcasting Co.* v. *Federal Communications Commission* [*supra*], 175 F. 2d 359.

Mansfield Journal Co. v. *FCC*, *supra*, 180 F. 2d at 35.[57] It is clear that the First Amendment does not exempt the press from incidental burdens, *Branzburg* v. *Hayes*, 408 U.S. 665, 682–683 (1972), and even if the prospective rule is such a burden, it achieves a valid regulatory purpose under the public interest standard. The press has no special immunity from its applicability.[58]

Petitioner ANPA also argues that a rule against licensing a newspaper owner to operate a television or radio station in the same community in which the newspaper is published violates the due process clause of the Fifth Amendment.[59] More specifically, it says that the rules single out newspaper owners from eligibility for broadcast licenses without furthering a legitimate government interest. The argument is unsound.

In the first place, a newspaper owner is not barred from becoming a broadcast licensee; he is prohibited from doing so only in the same community in which he owns a newspaper. *See General Telephone Co. of Southwest* v. *United States*, *supra*, 449 F. 2d at 860. For present purposes, the only other persons in the community who stand on the same footing as newspaper owners are the owners of radio

[57] In the *Mansfield* case, the court affirmed the Commission's denial of a radio license to a newspaper applicant who had a record of attempting to suppress competition. Rejection of the applicant's First Amendment argument did not, however, appear to depend on the particular facts of the case, but rather, on the conclusion that denial of a license, if valid under the Act, is not a denial of First Amendment rights.

[58] *Cf. Buckley* v. *Valeo*, 424 U.S. 1, 49–50 n. 55 (1976) (contrasting First Amendment violations in the Federal Election Campaign Act of 1971 with broadcast regulations designed to improve the quality and volume of coverage of public issues).

[59] Petitioner's brief in No. 76–1604 at pp. 27–29.

or television stations, and the rules under attack generally [60] apply equally to newspaper owners and radio or television owners.

Persons in those categories are treated differently for licensing purposes from other persons in their respective communities for reasons "wholly [related] to the objective of [the Communications Act]," thus making the classification reasonable. *Reed* v. *Reed*, 404 U.S. 71, 75–76 (1971). It is no longer open to doubt, as discussed elsewhere in this brief, that an objective of that Act is to regulate broadcasting with a view towards assurring for the public a diversity of viewpoints. It is therefore proper for the broadcast licensing agency to distinguish between those who already have the means for reaching the public and others who do not. In short, there is clearly "an appropriate governmental interest suitably furthered by the differential treatment." *Police Department of Chicago* v. *Mosley*, *supra*, 408 U.S. at 95 (citations omitted). *Cf. City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed insofar as that decision sustained the FCC's prospective rule.

Respectfully submitted,

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DECEMBER, 1977.

[60] An AM–FM co-located combination continues to be permitted. See notes 20 and 39, *supra*. But television-radio combinations are prohibited just as newspaper-radio and newspaper-television cross-ownerships are barred.

U.S. GOVERNMENT PRINTING OFFICE: 1977

FILED
JAN 11 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1595
(Consolidated with Nos. 76-1471, 76-1521, 76-1604, 76-1624, and 76-1685)

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER NATIONAL ASSOCIATION OF BROADCASTERS

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY BRIEF OF PETITIONER NATIONAL ASSOCIATION OF BROADCASTERS

This brief is submitted by petitioner National Association of Broadcasters ("NAB") in reply to the briefs filed in these consolidated cases by respondents Federal Communications Commission ("FCC"),

United States Department of Justice ("DOJ"), and National Citizens Committee for Broadcasting ("NCCB").

In its main brief,[1] NAB challenged the statutory authority of the FCC to adopt the regulation promulgated in Docket 18110 (NAB Br. 12-25) and challenged the constitutionality of the regulation under the First Amendment (NAB Br. 25-38). NAB's brief further took the position that, assuming the FCC had the statutory and constitutional authority to promulgate the rule, the Court of Appeals erred in holding that the FCC was required to order divestiture of all existing affiliated newspapers and broadcast stations (NAB Br. 38-57).

All three respondents' briefs support the Commission's statutory authority and the constitutionality of its regulation. NCCB and DOJ also attack the FCC's decision not to order universal divestiture, but only NCCB supports the Court of Appeals' decision in its entirety. DOJ, in contrast, contends that the Court of Appeals was correct in finding the FCC's decision not to order divestiture irrational, but takes the position that the Court erred in directing the Commission to adopt a divestiture rule.

This reply brief does not purport to respond to all the arguments made by the three respondents in their briefs. However, NAB believes that a response to some of the principal arguments raised would be helpful to the Court.

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[1] Brief for the Petitioner in No. 76-1595 (filed November 17, 1977).

I. THE REGULATIONS EXCEED THE FCC'S STATUTORY AUTHORITY.

Incredibly, in arguing in support of the FCC's statutory authority, none of the respondents' briefs even acknowledges that the Communications Act limits the FCC's authority to the regulation of "communication by wire and radio." 47 U.S.C. §§ 151, 152 (a) (1970). Instead, ignoring the statute, respondents note the FCC's authority to adopt regulations designed to promote diversity in the *broadcast* media by limiting the number of broadcast licenses that it will grant to a single applicant. (DOJ Br. 27-28; FCC Br. 21-22; NCCB Br. 16-17.) Then respondents leap quickly to the assertion that the Commission necessarily can do the same thing with respect to other communications media, including the press. It is this leap, however, that Congress has not empowered the FCC to make and that cannot be squared with the plain language of the Communications Act limiting the Commission's authority to the regulation of "communication by wire and radio."

The DOJ brief, for example, simply asserts that "[t]here can be no doubt" as to the Commission's authority and that it "follows directly" from the FCC's previous rules on multiple broadcast licenses. (DOJ Br. 28.) Such a conclusory assertion, with neither authority nor reason cited in support, cannot read out of the Act the "wire and radio" limitation that Congress wrote into it. The FCC's authority to expand its broadcast "diversity" rules to include newspapers no more "follows directly" from its broadcast rules than would an expansion of its broadcast "fairness" doctrine to include newspapers.

The FCC relies primarily upon *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) as the source for its asserted newspaper regulatory authority.[2] Its brief asserts that in *Storer*, "this Court upheld a portion of the FCC's multiple ownership rules as consistent with the Commission's authority to announce by rule 'its attitude on public protection against [concentration].' " (FCC Br. 21, *quoting* 351 U.S. at 203.) Significantly, the FCC's quotation chooses to insert the single bracketed word "concentration" in place of the actual words used by the Court, namely "*such* concentration." 351 U.S. at 203 (emphasis added). The significance of the words "*such* concentration" is that they follow immediately after the Court's statements that the Communications Act permits regulation "to assure fair opportunity for open competition in the use of *broadcasting facilities*" and that the FCC's multiple ownership rule reflected an "intent to limit *the number of stations* consistent with a permissible 'concentration of control.' " *Id.* (emphasis added). Earlier, the Court had made abundantly clear that the "purpose of the limitations is to avoid overconcentration *of broadcasting facilities.*" *Id.* at 193 (emphasis added). The FCC should not be permitted to convert this Court's validation of its regulations against concentration in broadcasting into a broad authority to act against what it may perceive to be "concentration" in fields other than "communication by wire and radio."

Most telling of the basic gap in the respondents' argument is NCCB's reliance on *Midwest Video* and

[2] *Storer* was also heavily relied upon by the Court of Appeals below. *See* NAB Br. 23-25.

Southwestern Cable.[3] NCCB asserts that those cases uphold "the Commission's authority to regulate communications media ancillary to its authority over broadcasting even absent express provision in the Act." (NCCB Br. 17.) However, the "communications media" at issue in both *Midwest Video* and *Southwestern Cable* were cable television systems. This Court made clear in both cases that under the Communications Act the FCC's authority is limited to the regulation of "communication by wire and radio" and that cable television could be regulated only because it was such a form of communication. 406 U.S. at 659-60; 392 U.S. at 167-68. Unless NCCB now claims that newspaper publication is also "communication by wire and radio," the cable television cases cannot support the FCC's authority here. To the contrary, those cases point in the opposite direction, and NCCB's reliance on them vividly illustrates the flaw in its argument.

Respondents do not attempt to controvert—and the regulation and record here do not permit them to controvert—NAB's description of the purpose, effect and rationale of the FCC's order. (NAB Br. 13-15.) As that description makes clear, the order is nothing less than an attempt by the FCC to restructure the mass communications media, broadcast and print alike, in accordance with its policies. This attempted restructuring is not intended to have and cannot have any effect on diversity in *broadcasting*, nor is it premised upon any finding of a detrimental effect on *broadcasting* performance resulting from common ownership.

[3] United States v. Midwest Video Corp., 406 U.S. 649 (1972); United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

Far from disputing NAB's brief in this respect, DOJ itself finds the order to be based upon a policy of "diverse ownership of the media of communications in general." (DOJ Br. 28.) At least if there were no First Amendment, Congress might have created a federal agency to regulate, in DOJ's words, "the media of communications in general." Such an agency might well have found to its liking a cross-media, one-to-a-market rule such as the one here. However, under the Communications Act the FCC is not that agency and it cannot lawfuly act as if it were. Respondents totally fail to come to grips with that basic fact.

With respect to Congress' confirmation that the FCC lacks the authority to promulgate its anti-newspaper rule (NAB Br. 19-20), respondents attempt to sidestep the point. The FCC and DOJ assert that Congress' statements are inapplicable to an FCC order that "merely" bars from holding broadcast licenses anyone who publishes a newspaper "within the same community." (FCC Br. 24; DOJ Br. 29.) That assertion, however, cannot stand in light of the comprehensive language used by Congress in denying that the FCC has the power to "promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or an association with, a newspaper."[4] Moreover, if the Act indeed gives the Commission authority to sweep across all forms of communications media so as to support a "local" newspaper ban, it would equally authorize a "national" ban should the Commission choose to impose one.

[4] Conference Rep. No. 2426, 82d Cong., 2d Sess. 15 (1952). *See* NAB Br. 19-20.

NCCB clings to *United States* v. *Wise*, 370 U.S. 405 (1962) (NCCB Br. 19), but fails even to attempt to show the applicability of that case here. (*See* NAB Br. 22-23.) Ironically, NCCB then attempts to rely on Congress' recent consideration of further amendments—a reliance that is precisely the kind foreclosed by *Wise*. (NCCB Br. 19-21.) As NCCB notes, the amendments under discussion in 1974 died without any resulting legislation or other action by the full Congress. Although there are passing references to the FCC's authority to promulgate a rule in Docket 18110, the failure of Congress to act is unexplained. The failure to act might well reflect the view of the full Congress that no such power is conferred by the Act, or any number of other possible explanations. *Wise* makes clear that such an ambiguous nonaction that gives rise to "several equally tenable inferences" can provide no support for a valid inference as to the intent of Congress. 370 U.S. at 411.[5]

The frailty of the legislative support claimed by NCCB is apparent when compared to the clear and direct action taken by Congress in connection with the 1952 amendments to the Act. As noted in NAB's brief (at 19-20), Congress there (1) undertook a broad review of the Act, (2) held hearings and fully considered a specific proposed provision that would have prohibited the FCC from promulgating any rule treating persons discriminatorily on the basis of their newspaper affiliation, (3) omitted the proposed pro-

[5] Interestingly, DOJ does not rely on the 1974 discussions. Instead, it observes in its brief that "subsequent legislative history is not helpful unless it culminates in legislation clearly demonstrating the view of Congress as a whole about the prior statute." (DOJ Br. 29 n.22.)

vision with the express explanation that it was omitted solely because it was unnecessary since the FCC had no such authority under the existing Act, and (4) proceeded to enact the bill reported by the Conference Committee in light of its explanation of the reasons for the omission.

NAB believes that the Communications Act itself leaves no real doubt that the FCC has stepped beyond the bounds of its statutory authority in its effort to regulate the mass communications media generally. But were there any doubt from the words of the Act, the action of Congress in connection with the 1952 amendments—as well as the FCC's own construction of its authority and its representations to Congress (see NAB Br. 16-19)—must remove it.*

II. THE REGULATIONS CURTAIL THE FIRST AMENDMENT RIGHTS OF BROADCASTERS TO PUBLISH NEWSPAPERS.

NAB contended in its main brief (at 25-37) that the government may not constitutionally condition the grant of a broadcast license upon a forfeiture of the licensee's First Amendment right to publish a local newspaper. In support of such a forfeiture, respondents advance the following: (1) there is no First Amendment right to a broadcast license; (2) any forfeiture of press freedoms which the FCC determines to be in "the public interest" is necessarily

* None of the respondents' briefs even mentions the controlling rules of statutory construction long recognized by this Court. *E.g.*, Chemehuevi Tribe v. FPC, 420 U.S. 395 (1975); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294 (1933) (see NAB Br. 21-22). The reason is simply that under those rules, the regulation adopted by the FCC in Docket 18110 is demonstrably beyond the power conferred on the agency by the Communications Act.

constitutional; (3) the forfeiture simply applies the FCC's constitutionally approved multiple ownership rules and Fairness Doctrine to newspapers; (4) just as newspapers are subject to the antitrust laws, so also are they subject to governmental regulation designed to establish diversity of opinion in the mass media; (5) a regulation prohibiting any broadcaster from publishing a local newspaper, and prohibiting any newspaper publisher from acquiring a broadcast license does not chill speech; (6) freedom of the press is not unconstitutionally abridged so long as it is only abridged locally; and (7) the abridgement is in any event constitutional because it does not affect the contents of newspapers. (DOJ Br. 21-25; FCC Br. 26-31; NCCB Br. 21-23.)

Manifestly, "[t]here is never a paucity of arguments in favor of limiting the freedom of the press." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 144 (1973) (Stewart, J., concurring). However, none of the respondents' arguments justify the limitation in this case.

Respondents presume to dispose of the constitutional issue by arguing that there is no First Amendment right to a broadcast license, citing *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969). But the constitutional issue in this case has nothing to do with any asserted "right" to broadcast, and no petitioner has claimed to possess such a right. The First Amendment right at stake in this case is the right to publish a newspaper; the issue presented is whether the government may indirectly abridge that right through conditions it has placed upon the granting of a particular governmental privilege or benefit.

Here, because that privilege or benefit happens to be a broadcast license, which, like newspaper publication, entails public expression of ideas, respondents hope to have the Court focus on the license rather than the newspaper as the object of the First Amendment claim.

The attempted deflection would have been more apparent, of course, had the conditioned benefit not partaken of any form of speech at all. For example, had the government conditioned its granting of either a tax exemption, or unemployment compensation, or employment to a school teacher upon the respective grantees' forfeiting their right to publish a local newspaper, it would have been clear that the forfeitures violate the First Amendment. *Speiser* v. *Randall,* 357 U.S. 513 (1958); *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Perry* v. *Sindermann,* 408 U.S. 593 (1972). These violations obviously would not depend on the taxpayer having a First Amendment right to the exemption, the unemployed party a "right" to compensation, or the school teacher a constitutional claim to a job. Rather, the issue in such cases would turn on the fact that a governmental benefit—be it a tax exemption, a teaching job, or a broadcast license—was granted at the expense of the applicant's right to publish a local newspaper:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser* v. *Randall,* 357 U.S. 513, 526. Such interference with constitutional rights is impermissible. [*Perry* v. *Sindermann, supra,* 408 U.S. at 597.]

Thus, the real question for review is whether a governmental benefit, whatever its nature, may be denied on the ground that the applicant chose to publish a local newspaper.

The FCC says (at 26-27) that it may take such an action so long as the denial is "in the public interest." Since the agency surely does not mean that its actions are exempt from constitutional scrutiny, the suggestion is apparently that whatever is determined to be "in the public interest" would perforce accord with the First Amendment. Even if this were so, it would necessarily beg the ultimate First Amendment question presented in this case. "[T]he First Amendment and the public interest standard of the statute are not coextensive. The two are related in the sense that the Commission could not 'in the public interest' place a requirement on broadcasters that constituted a violation of their First Amendment rights." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra,* 412 U.S. at 142 (Stewart, J., concurring).

On the merits of that ultimate First Amendment question, respondents take the view that for consti-

tutional purposes broadcasting and newspaper publishing are identical and that governmental regulation which is valid as to the former is likewise valid when extended to the latter. This Court has plainly ruled to the contrary. *Red Lion* itself, so much the centerpiece of respondents' arguments, makes this clear:

> *Red Lion* "makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case," by demonstrating that "'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" *Columbia Broadcasting* v. *Democratic Comm.*, 412 U.S. 94, 101 (1973), quoting *Red Lion Broadcasting Co., supra,* at 388. [*Buckley* v. *Valeo,* 424 U.S. 1, 50 n.55 (1976).]

Thus, when in *Buckley* it was argued that governmental restraints on broadcast speech could be similarly imposed on nonbroadcast speech, this Court declared:

> *Red Lion* therefore undercuts appellees' claim that § 608(e)(1)'s limitations [upon individual expenditures for political candidates] may permissibly restrict the First Amendment rights of individuals in this "traditional free speech case." [*Id.*]

The "right of every individual to . . . publish"—a right which the First Amendment nowhere withholds from broadcasters and would-be broadcasters—has been jeopardized here as it was jeopardized in *Buckley*. There is simply no authority for respondents' contention that the FCC's multiple ownership rules and Fairness Doctrine can be constitutionally extended to the "traditional free speech" of

newspaper publishers. *Buckley* v. *Valeo, supra; Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974).

Neither do respondents offer any authority or reasoned analysis for their proposition that since newspapers are subject to antitrust laws, they are therefore also subject to the government's diversity-in-the-mass-media program now before this Court. Thus, NCCB contends (at 22) that while the program "does not allow one making that choice [to publish a newspaper] to retain a broadcast license in the same locality, this is consistent with long-standing prohibitions against monopolization of the press (*Associated Press* v. *United States, supra,* n.3, 326 U.S. at 20) . . . ." Similarly, the FCC argues that "[n]ewspaper publishers . . . are not excused from the reach of valid regulatory policies, including the Commission's diversification policy. *See Associated Press* v. *NLRB,* 301 U.S. 103, 122-32 (1937); *Associated Press* v. *United States, supra,* 326 U.S. 1." (FCC Br. 28 (footnote omitted).) Finally, according to DOJ (at 23), "[i]f Congress constitutionally may prohibit the owner of one newspaper from acquiring another [where the acquisition would violate the antitrust laws], then it, and the Commission acting under its authority, constitutionally may prohibit the owner of one newspaper from acquiring a broadcast station . . . ."

What respondents never explain is the nexus they see between, on the one hand, antitrust laws made applicable to newspapers and other businesses alike and, on the other, the present diversity regulation made applicable to newspapers alone. The former laws,

according to the *Associated Press* cases upon which respondents rely, may be constitutionally applied to newspapers because they are designed solely to prohibit anticompetitive marketplace abuses having no relation whatever to newspaper expression. But the latter regulation is directed at newspapers only. It is specifically designed to curtail expression in the print media which the government believes should not be heard from a speaker who might also express his view over the air. It is not premised on any finding, either actual or potential, of monopoly, anticompetitive conduct, or license abuse. Rather, it applies to every mass media market, irrespective of the number of newspapers, broadcasters, or other speakers in the market, and regardless of the competitive nature of the market. Indeed, even were a broadcaster to establish a new newspaper to add to the media in a community, that action would cause the forfeiture of his broadcast license. Such a law, the antithesis of that presented in the *Associated Press* cases, is unconstitutional.

Turning finally to the specifics of the constitutional issue which NAB submits must be reached in this case, DOJ fairly recapitulates the matter as follows:

> The gist of [petitioners'] argument is that the government may not impose a burden (inability to own a broadcast station) on someone just because he engages in protected speech as the owner of a newspaper. To deprive newspaper owners of the ability to own broadcast stations, they say, would be to penalize pure speech. [DOJ Br. 21.]

To this, respondents have offered three answers.

First, in DOJ's view:

> The rule prohibiting co-located newspaper-broadcast combinations does not chill or control speech. It simply determines who, among many otherwise eligible applicants, shall not be entitled to operate a particular broadcast station. [*Id.* at 23-24.]

To us, this borders on the disingenuous. The rule challenged here flatly prohibits any broadcast licensee from expressing his views by publishing a local newspaper; it also admonishes all those who do choose to publish local newspapers that they will, as a consequence, be summarily excluded from any consideration for a broadcast license. To say that such a rule "does not chill or control speech" but "simply determines who . . . shall not be entitled to operate a particular broadcast station" blinks reality.

On such reasoning, furthermore, there is not a single unconstitutional condition which could not survive attack. Thus, the unconstitutional loyalty-oath condition struck down in *Speiser* v. *Randall, supra,* should have been upheld on the ground that it was simply a means of determining who should not be entitled to a tax exemption. By the same token, the refusal of unemployment benefits to a Seventh Day Adventist who failed to work on Saturdays should have been validated in *Sherbert* v. *Verner, supra,* as merely one criterion for assessing payment eligibility. Likewise, *Perry* v. *Sindermann, supra,* should have approved the dismissal of a teacher voicing public criticism of his college administration, viewing it as a method for selecting from competing job applicants. DOJ's position on this point is untenable.

Next, DOJ contends (at 21-22) that petitioners have exaggerated the abridgement of their right of free ex-

pression since the government ban is only as to *local* publication of newspapers; those under the ban have only to take their views to another community in order to regain the right to express themselves. For First Amendment purposes, the asserted distinction is meaningless. If the government may limit a newspaper's circulation, it may prohibit its publication altogether. A First Amendment that cannot check a ban on local publication will be powerless to negate it once it has spread nationwide. *Grosjean* v. *American Press Co.,* 297 U.S. 233, 244-45 (1936); *cf. Abood* v. *Detroit Board of Education,* 431 U.S. 209, 234 n.31 (1977).

Finally, all the respondents reason that since the government-exacted forfeiture of newspaper-publishing rights is not based on the content of the newspapers, the forfeiture therefore survives the strict scrutiny mandated in this case. (DOJ Br. 21 n.15, 24 n.18; FCC Br. 29 n.56; NCCB Br. 22 n.28, 23.) Both the premise and the conclusion are altogether unsound.

It is a strange construction of the First Amendment which supposes it to invalidate a diversity rule requiring newspapers to adopt a Fairness Doctrine, *Miami Herald Publishing Co.* v. *Tornillo, supra,* but to uphold a diversity rule requiring those same newspapers to cease publication altogether. Surely it is not being seriously contended that although government may not censor publications, it may nevertheless ban them outright.

Furthermore, by labeling this case as being in a "content neutral" category, and asserting that cases such as *Tornillo* and *Grosjean* are in a "content partial" category, respondents have done no more than create a false issue and useless classifications. Both

categories, at least as respondents have defined them, involve unconstitutional penalizing of free expression.

If anything, it is the First Amendment violations in *Tornillo* and *Grosjean* that were "content neutral," while it is this case which presents the deliberate governmental effort to regulate newspapers based on the views expressed therein. In *Tornillo,* the unconstitutional right-of-reply law actually took no regard for the content of any issues discussed in newspapers; nor was it concerned with the side any newspaper took on any issue. It required only that both sides of such issues be aired. *Grosjean* was even more "content neutral," at least in the manner respondents use the term. There, all newspapers above a certain circulation level were subjected to a particular tax, irrespective of their views or contents. This Court's condemnation of the tax was nevertheless unequivocal.

The basis for the cross-ownership ban in this case, whether well-founded or not, is that he who speaks through the broadcast medium would repeat himself if he also spoke through a newspaper; hence, for the sake of its vision of diversity, the government has decided to prevent the speaker from saying the same thing in both media. Quite simply, the government is prohibiting or penalizing newspaper publication because it supposes that the contents thereof would be similar to what might be aired by the publisher on his station, and because it believes those views should not receive such concentrated dissemination. What is that if not content control? Why is the government suppressing such speech if not because it believes that the particular speaker's views have been heard too much? How

can such suppression be found constitutional consistent with *Buckley* v. *Valeo, supra*?

The FCC puts it that "[p]etitioners simply cannot claim a wholesale exemption from the Commission's rules merely because they engage in publishing." (FCC Br. 29.) We submit that it is the other way around. Petitioners cannot constitutionally be subjected to wholesale exclusion from Commission licensing consideration merely because they engage in publishing. That is the exclusion accomplished by these rules. We urge this Court to set them aside.

III. THE ARGUMENT FOR DIVESTITURE IS PURELY THEORETICAL AND DISREGARDS BOTH THE BURDEN OF PROOF AND THE EVIDENCE.

A. The FCC Was Not Required To Order Divestiture On The Basis Of An Inconclusive Record.

The NCCB and DOJ arguments about divestiture rest mainly upon lengthy and repeated assertions of the importance of diversity and competition to the public interest. But this argument is irrelevant to the questions before this Court. There is no issue here regarding the importance of diversity and competition. Those can be conceded to be laudable objectives as well as elements to be weighed in assessing the public interest. Rather, the issues are: (1) whether there was any evidence before the Commission showing the need for new rules on this subject at all; (2) whether the Commission could rationally conclude that rules requiring divestiture of all present newspaper-affiliated broadcast stations required the weighing of different factors than rules merely prohibiting any future newspaper-broadcast affiliation; and (3) whether the Commission could rationally conclude that the proposed divestiture rules would result in undue harm to other

legitimate regulatory objectives, such as encouraging high quality programming by broadcast licensees, and that such harm outweighed any assumed advantages of the rules.

The NCCB and DOJ arguments on these issues simply assume the answer to the crucial policy question underlying the FCC's rulemaking proceeding. They disregard all record evidence that the goals of diversity and competition would not be significantly enhanced by the proposed order or that any benefits achieved might be offset by the harm caused by ordering sweeping divestiture. Thus, by relying on a profession of faith in divestiture and an unbalanced characterization of harm likely to be caused by a broad divestiture order, NCCB and DOJ seek to persuade this Court that the FCC has exercised its discretion in an arbitrary and capricious manner.

The NCCB and DOJ briefs present merely a caricature of the FCC's process of weighing the record before it in Docket 18110. To its credit, the FCC in its opinion below recognized that a tentative assumption—which is by no means as self-evident as NCCB and DOJ assume—is involved in any proposed rule precluding affiliation of newspaper and broadcast stations. This assumption is that separation of media ownership will result in benefits significant enough in terms of increased diversity to justify a massive restructuring of the industry.

Most of the massive record accumulated by the FCC deals with this issue and ancillary questions such as the present extent of competition and diversity in broadcast markets, the existence of any empirical evidence linking affiliation with inadequate performance

by broadcast stations or anticompetitive abuses, the extent of harm likely to be caused by divestiture, and the availability of means less drastic and disruptive for achieving sought objectives.

The FCC's Second Report and Order not only reviews such evidence in great detail but implicitly recognizes the degree of uncertainty that surrounds the assumption underlying the proposed rule. It noted that "[o]ur examination of the situation leads us to conclude that we may have given too little weight to the consequences which could be expected to attend a focus *on the abstract goal alone.*" 50 F.C.C.2d at 1078 (emphasis supplied) (JA. 197). The FCC went on to asert that "[w]e have concluded that *a mere hoped for gain* in diversity is not enough." *Id.* (emphasis supplied) (JA. 198). The hypothetical and speculative character of benefits of divestiture, altogether ignored by NCCB and DOJ, thus loomed significant to the FCC as it weighed possible detrimental consequences of its orders. The result of the Commission's deliberations was its conclusion that the assumption behind a prohibition on cross-ownership, while sufficient to justify a prospective rule, was not sufficient to warrant a massive restructuring of the industry through wide-scale divestiture. The question here is whether the Commission's sensitive treatment of this issue was irrational.

A curious aspect of this case is that the Court of Appeals, NCCB and DOJ all seem to think that if the evidence is "inconclusive," that supports an order of divestiture. This is erroneous and contrary to the position the Court and DOJ have previously taken.

It is elementary that the proponents of a rule carry the burden of proof for that rule. *See* Administrative

Procedure Act § 7(c), 5 U.S.C. § 556(d) (1970). Thus, if there is an absence of evidence, or if the evidence is so evenly balanced that it indicates no result, then there is no basis for the adoption of the proposed rule. This principle has been well stated by DOJ in its brief (at 22) to the Court of Appeals in *Home Box Office, Inc.* v. *FCC,* No. 75-1280 (D.C. Cir. Mar. 25, 1977), *cert. denied,* 98 S.Ct. 111 (1977), where it said:

> Every rule must stand or fall on the basis of its own reasonableness, as tested by evidentiary support in the record at the time when the rule is issued.

The Court of Appeals took the same position in that case in setting aside an FCC rule, stating:

> [T]he issue of the reasonableness of the balance struck between regulatory and competitive goals, where these diverge, is a matter to be tested on the basis of material in the rulemaking record .... [Slip op. at 64.]

The argument here is epitomized by the DOJ brief which says (at 32) that: "As there is no proof that concentration of ownership harms anyone, so there is no conclusive empirical proof that allowing cross-ownership serves the 'public interest'. . . ." The brief goes even further (at 34) to the remarkable conclusion that: "[H]yperbole is the basis of . . . the prospective rules at issue in this case." It should go without saying that lack of evidence and hyperbole are not an adequate basis for a regulation which will have drastic, far-reaching and irreversible consequences.

NCCB and DOJ cite no authority for the proposition that the burden of proof was on the opponents of di-

vestiture. The reasoning by which they arrive at such an unsupportable position appears to be as follows:[7] (1) The grandfather provision constituted a departure from existing Commission principles and precedent; (2) the Commission could justify such a departure only by finding the weight of the evidence in support of grandfathering; (3) the arguments given in support of grandfathering were insubstantial and arbitrary, and did not meet the required burden of proof; and (4) therefore, the grandfather provision must be overturned.

The basic flaw in this reasoning is its faulty premise. Contrary to the contentions of NCCB and DOJ, it is wide-scale divestiture, not grandfathering, which would have constituted a departure from existing precedent. Under existing precedent there was no prohibition on newspaper-broadcast affiliation, and renewal applications of newspaper-affiliated broadcast stations were always judged on the basis of the broadcast record of such affiliated stations. *See Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966) ("[I]n a renewal proceeding past performance is [the Commission's] best criterion . . . ."). Furthermore, under applicable precedent the Commission had regularly avoided ordering substantial divestiture when adopting or modifying its multiple ownership rules. See cases cited in NAB Br. 43 n.19. In refusing to deviate from these precedents, the Commission held that "the idea of divestiture . . . requires a demonstration of more than just theory or a resting on narrowly drawn balances." 50 F.C.C.2d at 1074 (JA. 188-89). Thus, if precedent is to

[7] *See* DOJ Br. 35-51; NCCB Br. 27-45.

control, with the record as inconclusive as DOJ acknowledges it to be, the Commission clearly had the discretion, if not the obligation, to refuse to deviate from precedent by ordering universal divestiture.

The NCCB/DOJ analysis of the harms of divestiture is similarly flawed. It consists of setting up and knocking down straw men. Contrary to respondents' assertions,[8] Commission findings and actions in individual comparative licensing proceedings and voluntary license assignment proceedings do not undercut the reasonableness of the Commission's concern for potential harms which might derive from universal, mandatory divestiture. That each of those harms might not exist in all possible cases does not mean that the Commission was arbitrary in relying on them.

This faulty analysis was equally reflected in the central holding of the Court of Appeals, which respondents defend, that "the Commission erred in concluding that the other policies it advanced required it to find evidence of harm before ordering divestiture." 555 F.2d at 962 (JA. 415-16). This holding, however, misstates the FCC's ruling.

The FCC's decision to require some evidence of either harm of concentration, or the benefits of divestiture, was not based on any perception that the agency was "required" to do so, nor did it stem solely from the three countervailing values of local ownership, continuity, and avoidance of economic disclocations. Instead, the requirement was simply a function of the agency's judgment that the case for universal divestiture had not been made, a judgment which took into

[8] *See, e.g.*, DOJ Br. 42-43; NCCB Br. 33, 44.

account the absence of any evidence supporting divestiture, the three countervailing values, and other competing policy considerations such as the presumption against retroactive rules. *See* 50 F.C.C.2d at 1047 (JA. 137).

As the Court of Appeals recognized, but failed adequately to consider, the FCC's decision was thus based "primarily on policy," 555 F.2d at 957 (JA. 396). The basic principle that courts should defer to agency expertise thus applies here with special force, since the very purpose behind Congress' creation of specialized administrative agencies was to delegate to the agencies the power to balance and resolve conflicting interests by utilizing their accumulated expertise. *See NLRB* v. *Truck Drivers Local 449,* 353 U.S. 87, 96 (1957). As this Court commented in upholding such a balance of interests struck by the ICC:

> [The ICC has been granted the] power to weigh the competing interests and arrive at a balance that is deemed "the public convenience and necessity." . . . If the Commission has "drawn out and crystallized these competing interests [and] attempted to judge them . . ., we can require no more." [*Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 293-94 (1974).]

Similarly, in the instant case the FCC has identified the competing policy interests, and has determined that tangible proof of the benefits of diversity was required to warrant divestiture. The Court of Appeals should have deferred to this policy judgment of the agency. *Cf. Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 122-23 (1973) (noting that the Court of Appeals had "failed to give due weight" to the FCC's "judgment on [policy] matters"); *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 203 (1956) (observing that Congress has placed "regulation of businesses like communication in specialized agencies").

Moreover, the Commission's judgment was based in part on its evaluation of complex factual questions about which there were no reliable data, such as the extent to which divestiture would produce diversity or disrupt continuity. *See* 50 F.C.C.2d at 1062-63, 1078 (JA. 166-68, 196-98). Despite the FCC's superior expertise and experience in these matters, the Court of Appeals overruled the agency's judgments, commenting, for example, that in its opinion, a "one time alteration in the ownership structure of the broadcast industry should not effect the public's interest in quality programming. . . ." 555 F.2d at 964 (JA. 422). The lower court has thus ignored the principle that "[t]his type of judgment, involving the balancing of interrelated . . . factors, is peculiarly within the scope of the expertise with which [a specialzed agency] is presumptively endowed." *Plumbers Local 519* v. *Construction Industry Stabilization Comm.,* 479 F.2d 1052, 1056 (Temp. Emer. Ct. App. 1973); *Carpenters 46 County Conference Bd.* v. *Construction Industry Stabilization Comm.,* 393 F. Supp. 480, 489 (N.D. Cal. 1975).

Basically, the Court of Appeals, NCCB and DOJ simply disagree with the Commission's assessment of the weight to be accorded the countervailing factors, all of which can affect the quality of operations of the Commission's broadcast licensees. But it is not the role of a reviewing court to substitute its judgment, or the judgment of an intervening party, for that of the agency to which Congress has delegated regulatory responsibility. The factors which the Commission con-

sidered were clearly within its expertise, and its decision presented a rational explanation of its reasoning. Nothing more was required.

B. The Record Was Not Inconclusive Insofar As It Showed A Plethora Of Media Voices In Most Areas And A Continuing Trend Toward Deconcentration.

Even were the evidence "inconclusive" in the sense of being evenly balanced—which is not asserted and which we believe is not the case—that would not warrant the issuance of a rule requiring large-scale divestiture on the basis of surmise, speculation and theory, as NCCB and DOJ seek here. *A fortiori,* the Commission was not required to order such divestiture on the basis of a record which persuasively demonstrated the absence of need for such a rule.[9]

As noted above, both the Court of Appeals and its principal proponents here, NCCB and DOJ, frankly confess that there is no evidentiary support for the result they desire and accordingly rest their arguments entirely upon wholly hypothetical and speculative assumptions and theories. On the other hand, there was substantial evidence in the record that most of the assumptions and arguments on which NCCB and DOJ rely are either unwarranted or contrary to fact. Their blithe statements about increasing diversity by requiring blanket divestiture are not merely unsupported, but are controverted by the record.

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[9] The following analysis of the record is, of course, not intended to convince this Court that the grandfather provision must have been adopted by the FCC. Rather, the discussion is intended to demonstrate that the Commission acted in a reasonable and rational manner in rejecting the proposal for wide-scale divestiture.

Numerous studies were submitted to the FCC demonstrating that there is no greater correspondence of viewpoints and treatment of subject matter between commonly owned broadcast stations and newspapers than between separately owned stations and newspapers.[10]

The FCC was also presented with and took note of evidence that newspapers and broadcast stations are not "like media" offering substantially the same service to the public as are, for example, two radio stations in the same market. 50 F.C.C.2d at 1065-66 (JA. 172-74). These differences in the characteristics of the two media guarantee an inherent diversity in the presentation of information and viewpoints to the public. For example, as the FCC noted, broadcast news often deals with headlines, whereas newspapers offer analysis and background. *Id.* at 1065 (JA. 172). Broadcast facilities only partially act as a conveyer of news and are primarily entertainment media. By contrast, most nonadvertising space of newspapers is devoted to news. *Id.* at 1065-66 (JA. 172).

The FCC was further aware that, unlike its other affiliation rules, a rule requiring divestiture would not increase the number of separately owned broadcast stations in a market. Moreover, the FCC was presented with no evidence or argument that prohibiting affiliation would increase the diversity of views available

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[10] *See, e.g.,* Anderson, *Broadcast Stations and Newspapers: The Problem of Informational Control: A Content Analysis of Local News Presentations* (1971) (NAB Exhibit E) (JA. 593); McDougald & Sasser, *Atlanta News & Editorial Research Study;* Anderson & McDaniel, *Two Studies: A Historical Analysis and Content Comparison of Cox Broadcasting Corporation's Affiliated News Media, Dayton, Ohio.*

from broadcast media subject to FCC regulation. The absence of immediate, tangible or demonstrable benefits in the broadcast industry was thus another factor properly taken into account by the FCC in determining whether to order widespread divestiture.

The NCCB and DOJ briefs read like conventional antitrust briefs in merger cases—talking about the evils of concentration and the virtues of deconcentration. But these arguments are completely inappropriate here, because the record failed to provide any factual basis for them. The FCC was presented with no evidence that divestiture was necessary to alleviate any scarcity of diverse sources of opinion and information or would significantly increase the diversity of viewpoints available to the public. NAB Br. 49-51. The Commission was fully aware of this abundance of talk and absence of evidence. 50 F.C.C.2d at 1080 n.29 (JA. 201).

On the other hand, there was in the record detailed, extensive and uncontradicted evidence of the number and kind of media voices in every broadcasting market in the United States.[11] This was, so far as we are aware, the first complete media census of the country that had ever been made. NAB submitted exhibits showing, by name and other details, every television station, radio station, newspaper and magazine published or circu-

[11] M.H. Seiden & Assocs., *Mass Communications in the United States—1970* (NAB Exhibits A-1 through A-4). While the Commission considered this study unrealistic in giving too much weight to minor media from outside the market (*see* 50 F.C.C.2d at 1079 n.28, JA. 200), it would have been equally unrealistic to disregard media other than co-located broadcast stations and newspapers in assessing the need for a broad divestiture order.

lating in every U.S. media market.[12] This evidence showed that there is a plethora of media voices—no matter how counted—in every American media market.

For example, in the largest market, New York City, there are available to the residents at least 610 media, owned by a total of 434 different owners. Of the 610, 519 originate in the market and these are owned by 372 different owners. (JA. 649.) While the figures understandably tend to be lower in smaller markets, the following table demonstrates that the average number of media both in the market and originating in the market, as well as the average number of owners of those media, is numerous for all markets:

Average Number of Media and Owners

	Total number in market		Number originating in market	
	Media	Owners	Media	Owners
Markets 1-50:	217	170	139	111
Markets 51-100:	161	130	80	68
Markets 101-150:	116	95	47	41
Markets 151-204:	76	63	21	18

[JA. 650]

This evidence was certainly more persuasive than the hortatory rhetoric of NCCB and DOJ. The suggestion that there is a concentration of control, or a trend toward concentration or lessening of numbers in either

[12] The census is summarized in the Appendix at 466-592.

broadcasting or journalism is simply not accurate. As the respected reporter James Reston has aptly noted:

> Actually, with the rise of television and radio broadcasting stations, the sources of information in the United States have dramatically increased in recent decades, breaking the monopoly of the printing press.
>
> • • •
>
> Out of this vast network of stations and newspapers now pours out night and day the greatest flow of information and the loudest clash of divergent opinion ever inflicted on a long-suffering people in the history of the written and spoken word. [N.Y. Times, Nov. 21, 1969, at 46 (JA. 654).]

The only response by proponents of divestiture to this record evidence of media diversity was the argument that not all of the media listed for each market are major media, and that some media are read, watched or listened to by more people than others. No doubt this is true. However, the First Amendment does not guarantee anyone an audience, it merely guarantees the right to speak. The number of media voices does show the tremendous range of diversity in the media markets. The audience attracted by the several voices is a matter that cannot be controlled by government under our Constitution. Many critics bemoan the fact that masses of people spend much time watching frivolous comedies or violent drama on television while more educational and cultural shows are much less popular. Whatever the facts may be with respect to that aspect of broadcasting, it is not the function of government to guarantee an audience. The data demonstrate beyond doubt that there is a diversity of media voices available in all media markets.

Furthermore, other undisputed evidence in the record showed that if concentration is taken to mean affiliation between broadcasters and newspapers—which is the apparent meaning in the NCCB and DOJ briefs—that concentration has been steadily decreasing over the years and has reached the lowest point that has existed since the advent of television.

The Udell study [13] revealed that newspaper-affiliated television stations have declined from 29% of all television stations in 1955 to 14% in 1969. Moreover, newspaper control of, or affiliation with, broadcast outlets continued a sharp decline. By 1970, only 4% of broadcast stations were affiliated with newspapers and only 3% of the broadcasters in the top 100 markets were publishers or affiliated with publishers.[14] By 1970, the percentage of all broadcasters with newspaper affiliations was lower than in any year since broadcasting began in 1922.[15]

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[13] Udell, *Economic Consequences of FCC Proposal and Critique of Relevant Literature*, submitted by the ANPA.

[14] See NAB Revised Ex. C (JA. 870).

[15] *Id.* Not only had there been a decrease in affiliation but there had concurrently been an increase in both the number of media outlets and the number represented by separate owners. This was true whether one examined the top 10 markets, the top 25, the top 50, or the top 100. Indeed, it appeared that increases had been greatest in the smaller markets of the top 100. During the period from the beginning of broadcasting in 1922 through 1970, the total number of media outlets and of media voices (*i.e.*, separate media owners) increased faster than the population, so that there were more media outlets per 1,000 of the population in 1970 than in any prior year, as well as more separate voices (JA. 871). The number of broadcasting outlets in the top 100 markets grew over 10 times (1,062%) from 1922 to 1970 and the number of broadcast voices increased by 713% (JA. 868). Sterling, *Ownership Characteristics of Broadcast-*

Analysis of the data presented by NAB in its revised Exhibit F showed that the trend away from cross-media affiliation continued until the FCC closed the record in Docket 18110 prior to oral argument.[16] The NAB data relating to transfer applications were even more dramatic in showing the trend away from multi-media affiliation in single markets.[17] Thus, the evidence before the FCC clearly showed that market forces were causing substantial diversification of the media, and that a broad divestiture rule was not necessary to promote diversity.

CONCLUSION

For the reasons outlined herein, and in its main brief, NAB respectfully requests this Court to hold that

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ing Stations and Newspapers in the Top 100 Markets, 1922-1967 (NAB Exhibit C) (JA. 659), as amended by the Supplement to NAB Exhibit C Regarding Cross-Ownership of Broadcasting Stations and Newspapers (NAB Revised Exhibit C) (JA. 866).

[16] Out of a total of 654 applications for new station licenses, only 3 were by newspaper-affiliated applicants, and in each of these cases the applicant had an AM license and was seeking a companion FM license (JA. 884). Disregarding applications involving changes of facilities within a community and AM-FM combinations, which the FCC now expressly permits, only 5 applications out of a total of 654 involved media-affiliated applicants. *Id.*

[17] Newspapers were sellers of broadcast interests in 35 applications for transfer and were buyers in only two (JA. 885, 886). Both newspaper buyers were seeking to purchase AM stations—none sought to purchase television stations (JA. 886). Television-affiliated licensees were sellers in 19 transfer applications, and not a single television-affiliated licensee was a buyer (JA. 885, 886). Disregarding AM-FM combinations and exchanges of similar facilities within a community, out of a total of 1,062 transfer applications during the period studied, only a single one involved the acquisition of a broadcast license by an applicant with other media affiliations in the community. That single exception was a newspaper-affiliated applicant which sought to acquire an AM station (JA. 886).

the FCC exceeded its constitutional and statutory authority in adopting its challenged regulations, and to reverse the Court of Appeals affirmance of those regulations.

Alternatively, NAB respectfully requests this Court to hold that the grandfather provision in those regulations was reasonably adopted, and to reverse the Court of Appeals action vacating that provision.

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January 11, 1978